Supreme Court, U.S.
FILED
JAN 4 1992
OFFICE OF THE CLERK

92-1168

CASE NO. _____

THE SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY, Jr.,

Petitioner,

v.

LLOYD DUEST,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA TERENZIO
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
111 GEORGIA AVENUE, SUITE 204
WEST PALM BEACH, FL 33401
(407) 837-5062

COUNSEL FOR PETITIONER

QUESTION PRESENTED

WHETHER A PANEL DECISION OF THE ELEVENTH CIRCUIT OF APPEALS, FINDING OF HARMFUL ERROR BASED ON A VIOLATION OF JOHNSON v. MISSISSIPPI, 486 U.S. 578, 108 S. Ct. 1981, 100 L.Ed.2d 575 (1988), IS CONTRARY TO THIS COURT'S PRONOUNCEMENTS IN SOCHOR v. FLORIDA, 504 U.S. __, 119 L.Ed.2d 329, 112 S. Ct. __ (1992), AND GRIFFIN v. UNITED STATES, 502 U.S. __, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991)

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-iv
OPINION BELOW	1-2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	3-4
STATEMENT OF THE CASE	4-9
REASONS FOR GRANTING THE WRIT	
WHETHER A PANEL DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS, FINDING HARMFUL ERROR BASED ON A VIOLATION OF JOHNSON v. MISSISSIPPI, IS CONTRARY TO THIS COURT'S PRONOUNCEMENTS IN SOCHOR v. FLORIDA, 504 U.S. __, 119 L.Ed.2d 329, 112 S.Ct. __ (1992), AND GRIFFIN v. UNITED STATES, 502 U.S. __, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991)	9-31
CONCLUSION	32

TABLE OF AUTHORITIES

CASES	PAGE
Chapman v. California, 386 U.S. 18 (1967)	27-28
Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)	11
Commonwealth v. Duest, 26 Mass.App.Ct. 137	11
Duest v. State, 462 So.2d 446 (Fla. 1985)	2,7,10
Duest v. Dugger, 555 So.2d 849 (Fla. 1990)	7,18,27
Duest v. Singletary, 967 F.2d 472 (11th Cir.1992)	1
Griffin v. United States, 502 U.S. ___, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991)	i,9,17,22
Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988)	i,8,11
Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 329, 112 S.Ct. ___ (1992)	i,9,17

OTHER AUTHORITIES

28 U.S.C. §1254(1) 3

CASE NO. _____
THE SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY, Jr.,

Petitioner,

v.

LLOYD DUEST,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), and is reproduced in the appendix to this pleading.[1] The order denying rehearing was rendered on October 7,

---

[1] [A-] represents citation to the materials contained in the appendix to this pleading.

1992 and is reproduced in the appendix to this pleading. [A-1-A-62].

The decision of the United States District Court for the Southern District of Florida, issued September 14, 1990 is unreported. The decision is reproduced in the appendix to this pleading. [A-63-A-173].

The decision of the Florida Supreme Court denying Duest's Johnson v. Mississippi claim is reported at 555 So.2d 849 (Fla. 1990), also set forth in the appendix to this pleading [A-174-A-198].

The decision of the Florida Supreme Court regarding Duest's direct appeal is reported at Duest v. State, 462 So.2d 446 (Fla. 1985), and is reproduced in the appendix to this pleading. [A-199-A-212].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on July 15, 1992. A petition for rehearing and suggestion for rehearing in banc was filed and subsequently denied on October 7, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States are involved:

Amendment XIV, which provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States: nor shall any

state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment X, which provides that:

> Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

Lloyd Duest was indicted for the first degree murder of John Pope in Fort Lauderdale, Florida. The indictment alleged that on Valentine's Day weekend Duest picked up John Pope from a gay bar, returned to the victim's home and repeatedly stabbed him to death.

The record reflects that Duest came to Florida by bus from Massachusetts, the weekend of February 12, 1982. Upon his arrival, he told a witness that he was going to go to a gay bar to roll a fag. During the weekend, Duest was seen with Mr. Pope leaving a gay bar. Later that day Duest was seen alone driving the victim's car. Blood stains were seen on Duest's clothes, and the victim's jewelry was found in the car driven by Duest. Later that evening, Pope's roommate discovered the victim's nude body on the bathroom floor. He had been repeatedly stabbed. The struggle started in the victim's bed and ultimately ended in the bathroom. Duest was also in possession of a seven-inch knife during that time.

At trial Duest presented an alibi defense through several witnesses who

claimed that he was in Massachusetts at the time of the murder. At sentencing the State presented evidence of Duest's two prior violent felony convictions as an aggravating circumstance. Duest presented testimony of various family members. The trial court found five aggravating factors to be supported by the evidence.[2] The trial court found no

---

[2] The aggravating factors were: 1) the capital felony was committed while the defendant was engaged in the commission of a robbery, Section, 921. 141 (5)(d) Fla. Stat. (1985); 2) the capital felony was committed for pecuniary gain, Section 921.141 (5)(f); 3) the capital felony was especially heinous, atrocious, or cruel, Section 921. 141 (5)(h); 4) the capital felony was a homicide which was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal jusitification, Section, 921.141 (5)(i); and 5) the defendant has previously been convicted of a prior violent felony.

The trial court considered the aggravating circumstances 1 and 2 as one because of the overlapping facts. Duest v. State, 462 So.2d 446, 449 (Fla. 1985).

mitigating evidence applied to the case. The trial court imposed the death penalty. The Florida Supreme Court affirmed the conviction and sentence of death in Duest v. State, 462 So.2d 446 (Fla. 1985).

In 1987, Duest sought post-conviction relief in the state trial court. While the motion was pending, the Governor signed a death warrant. After an evidentiary hearing, the trial court denied relief. The Florida Supreme Court refused to grant a stay of execution and affirmed the trial court's denial of relief. Duest v. Dugger, 555 So.2d 849 (Fla. 1990).[3] The Florida

---

[3] The Florida Supreme Court specifically addressed Duest's Johnson v. Mississippi issue, concluding that any error was harmless beyond a reasonable doubt because "there is still a basis for the aggravating circumstance of a prior conviction of a violent felony." Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990).

Supreme Court also denied all relief from Duest's state habeas corpus petition. Duest, supra.

Duest then petitioned for federal habeas relief in the United States District Court for the Southern District of Florida. Judge Ryskamp granted a stay of execution. Following the filing of further pleadings and oral argument, the district court denied all relief on September 14, 1990. Judge Ryskamp determined that any error under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), was harmless beyond a reasonable doubt. An appeal was taken to the Eleventh Circuit. On July 15, 1992, a panel of the Eleventh Circuit Court of Appeals reversed the district court's finding of harmless error regarding Duest's Johnson v. Mississippi, claim.

The State, in its suggestion for rehearing in banc of the panel decision, relied heavily on this Court's decisions in Sochor v. Florida, 504 U.S. __, 119 L.Ed.2d 329, 112 S.Ct. __ (1992), and Griffin v. United States, 502 U.S. __, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991). Rehearing was subsequently denied on October 7, 1992.

REASONS FOR GRANTING THE WRIT

WHETHER A PANEL DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS, FINDING HARMFUL ERROR BASED ON A VIOLATION OF JOHNSON v. MISSISSIPPI, IS CONTRARY TO THIS COURT'S PRONOUNCEMENTS IN SOCHOR v. FLORIDA, 504 U.S. --, 119 L.Ed.2d 329, 112 S.Ct. __ (1992), AND GRIFFIN v. UNITED STATES, 502 U.S. __, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991).

Lloyd Duest was convicted of two prior violent felonies in Massachusetts in 1970: 1) armed robbery, and 2) aggravated assault with intent to

murder. Both felonies were argued as the basis for the aggravating factor that the defendant had previously been convicted of a prior violent felony.[4] Duest v. State, 462 So. 2d 446, 449 (Fla. 1985). Subsequent to his direct appeal on the Florida murder conviction, Duest's conviction for aggravated assault with intent to murder was vacated on a technicality. In reversing the conviction, the Massachusetts appellate court noted that:

> The Commonwealth acknowledges that it cannot meet its burden of establishing the circumstances of the plea to the indictment charging armed assault with intent to murder. Note 1, supra. There is no proof that the defendant harbored a specific intent to murder or kill when shots from a pistol were fired out the window of the getaway vehicle at the police cruiser chasing that vehicle. The only

---

[4] Id, 921.141 (5)(b).

> evidence on that point is to the effect that the shots were fired at the pursuing police officers in the cruiser. The record, therefore, is fatally deficient on the essential mental element of armed assault with intent to murder, as that element has been clarified by Commonwealth v. Henson, 394 Mass. 584 (1985).

Commonwealth v. Duest, 26 Mass. App. Ct. 137, 138-139, n. 2.

Due to the fact that the aforementioned prior conviction was vacated, a panel of the Eleventh Circuit found harmful Eighth Amendment error based on Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), and Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Regardless of the fact that the jury in Duest's murder case received less exposure to the vacated conviction than did the jury in

Johnson,[5] the panel still found harmful error because the jury recommended death by a vote of seven to five[6] and, during deliberations, the jury requested a copy of both of Duest's prior convictions. The court determined that:

> Although the jury in this case received less exposure to the vacated conviction than did the jury in Johnson, the circumstances surrounding the jury's consideration of this conviction indicate that reversible error occurred here

---

[5] The prosecutor never mentioned the underlying felonies used to prove this aggravating factor during his closing argument. The jury was instructed on all the factors and was told that both the armed robbery and the aggravated assault would qualify as proof of the circumstance.

[6] The actual vote of the jury regarding its recommendation, is irrelvant. The standard to be applied in assessing harmful error is one of reasonable probability. Strickland v. Washington, 466 U.S. 668, 695 (1984); Bertolotti v. Dugger, 883 F.2d 1503, 1519, n. 12 (11th Cir. 1989). The analysis does not vary according to the number of jurors who voted one way or another.

as well. The fact that the jury requested to see the vacated convictions after having deliberated for a time suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the appropriate sentence. It is important to note that the jury did not request additional information or instruction from the trial court on any other matter. It is unclear from the record how much time elapsed between the jury's request and its arrival at a recommendation of death; nevertheless, the fact that the entire sentencing hearing took only one day, combined with the other circumstances surrounding the jury's determination, further calls into question the reliability of the jury's recommendation. Finally, that the jury recommended death by the narrowest of margins renders its consideration of the vacated conviction especially problematic. Thus, the context in which the sentencing jury considered Duest's conviction undermines confidence in the jury's recommendation of death as much as the context in which the jury imposed death in Johnson.

> The Johnson Court rejected a finding of harmless error not only because of the jury's particular exposure to Johnson's vacation conviction, but also because "the error [in Johnson] extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." 486 U.S. at 590, 108 S.Ct. at 1989. The Clemons Court reemphasized this distinction in holding that the Mississippi Supreme Court was not precluded from conducting a harmless error analysis on remand where the trial court, rather than admitting inaccurate and misleading evidence, merely had given an erroneous instruction regarding application of the "especially heinous atrocious and cruel" aggravating circumstance. Clemons, 494 U.S. at 754-55 n. 5, 110 S.Ct. at 1451 n. 5.

Duest, 967 F.2d at 481-482.

The Circuit Court's characterization of the evidence regarding aggravated assault as materially inaccurate, is incorrect. Duest, 967 F.2d at 482. The

court acknowledged that Duest did in fact commit the aggravated assault.[7] Id. The inaccuracy is related specifically and only to Duest's intent during commission of the aggravated assault.[8] It cannot be emphasized enough as well as conceded by the panel,

---

[7] This Court has found no constitutional error to exist when a state relies on testimony of a prior crime for which a defendant is acquitted. Dowling v. Unites States, 493 U.S. 342, 107 L. Ed.2d 708, 110 S. Ct. 668 (1990). That holding has been extended to penalty phase evidence as well. Florida v. Burr, 496 U.S. 914, 110 L. Ed. 2d 629, 110 S. Ct. 2608 (1990). Consequently any error in admitting evidence of collateral crimes for which there has been no conviction is merely an error of state law. Barclay v. Florida, 463 U.S. 939, 77 L. Ed.2d 1134, 103 S.Ct. 3418, reh den (U.S.) 78 L. Ed. 2d 185, 104 S.Ct. 209 (1983); Wainright v. Goode, 464 U.S. 78, 78 L. Ed.2d 187., 104 S. Ct. 378 (1983). Consequently, any evidence regarding Duest's criminal actions against the two police officers is constitutionally admissible.

[8] At sentencing, the jury was told that Duest admitted to the crime as he pled guilty to the offense.

that Duest did commit the aggravated assault. Furthermore, unlike Johnson, in the case at bar there was evidence remaining that was relevant to sentencing. The jury knew Duest had committed the crime, and the State still had the prior conviction for armed robbery that sustained the finding of the aggravating factor.[9] These relevant facts along with the Court's concession that the prior felony was not emphasized, makes the case sub judice distinguishable from Johnson and

---

[9] In Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), this Court held that Johnson must be presumed innocent of the vacated assault since the only evidence the state had consisted of a document establishing that the defendant had been convicted of that offense. The relevance of that document was lost when the conviction was vacated. The Court observed that other evidence would have supported the criminal conduct had it been introduced at trial.

warrants reversal of the panel's decision.

The panel's analysis and ultimate conclusion is contrary to this Court's decisions in Sochor v. Florida, 540 U.S. __, 119 L.Ed.2d 329, 112 S.Ct. __ (1992); Griffin v. United States, 504 U.S. __, 119 L.Ed.2d , 112 S.Ct. __ (1992). In Sochor, this Court refused to find any Eighth Amendment error regarding an imprecise/improper jury instruction for the aggravating factor of "heinous, atrocious, and cruel.[10] Since there was sufficient evidence to sustain the finding of that factor in Sochor's case, no reversible error occurred.

In the case at bar, the Florida Supreme Court applied the correct harmless error analysis:

---

[10] Section, 921.141 (5)(h)(1985).

> We believe beyond a reasonable doubt that Duest would still have received a sentence of death without evidence of this conviction.
>
> In Johnson, the Supreme Court vacated a death sentence predicated on part on the aggravating circumstance of prior conviction of a violent felony when the conviction upon which the aggravating circumstance was based was later set aside. However, in the instant case evidence was introduced that Duest had also been convicted of armed robbery. This conviction remains undisturbed. Therefore, there still is a basis for the aggravating circumstance of prior conviction for a prior violent felony. Bundy v. State, 538 So.2d 445 (Fla. 1989); Daughtery v. State, 533 So.2d 287 (Fla. 1989). In Burr, the evidence of a collateral crime later held to be inadmissible provided much of the basis for two of the three aggravating circumstances.

Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990).

The district court also applied a harmless error analysis:

As required by Chapman (citation omitted), the Florida Supreme Court applied the proper "beyond a reasonable doubt" standard when conducting its harmless error analysis. Duest, 555 So.2d at 851; see Clemons, __ U.S.__, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. First, the court recognized that this case is distinguishable from Johnson, because even considering the vacated conviction, Duest still had an undisturbed conviction for armed robbery. Duest, 555 So.2d at 851. Because of that remaining conviction, "a basis still existed for the aggravating circumstance of prior conviction of a violent felony." Id. (citing Bundy v. State, 538 So.2d 445 (Fla. 1989); Daugherty v. State, 533 So.2d 287 (Fla.), cert. denied, 488 U.S. 959, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988)). Further, the supreme court noted that three other valid aggravating circumstances applied to Duest's sentence and concluded that "even if we were to find that one or two of the aggravating circumstances found by the trial judge, [sic] was inapplicable, it would still be appropriate to maintain the death penalty. Id. (quoting Duest v. State, 462 So.2d at 450).

Considering the forgoing, it appears that the Florida Supreme Court concluded that it was beyond a reasonable doubt that Duest's sentence was unaffected by consideration of the prior Massachusetts's conviction, which was later vacated because the aggravating factor of a prior violent felony still existed and was thus properly considered in the balance of aggravating and mitigating circumstances. Under Clemons, __ U.S. at __, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. In contrast to Clemons, the record supports the Florida Supreme Court's conclusion that the error in Duest's case was harmless. Here, the state did not emphasize repeatedly and argue the conviction that was later vacated to place little emphasis on the other violent felony conviction that remained. See Clemons, __ U.S. at __, 110 S.Ct. at 1451, 108 L.Ed.2d at 741; see also Johnson v. Mississippi, 511 So.2d 1333, 1338 (Miss. 1987) (state repeatedly argued invalidated aggravating circumstance), reversed, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Instead, the trial judge merely read both indictments to the jurors and informed them that the

> convictions had been rendered on those indictments. Supplemental brief at 2. Having reviewed the record, the court concludes that the consideration of the vacated conviction was harmless error that does not require remand for a new sentencing hearing.

The evidence presented to the Eleventh Circuit was the same evidence presented to both the Florida Supreme Court and the district court. That Court did not possess any more knowledge than either of the lower courts, consequently, the panel was in no better position to judge harmless error. Despite these circumstances, the panel found harmful error. The panel's decision to ignore the critical fact that there was sufficient evidence to sustain the existence of this factor, absent the aggravated assault with intent to murder, is unreasonable and is in direct conflict with Sochor. The

circuit court's analysis and ultimate conclusion that harmful error occurred in the instant case has resulted in a per se reversible error rule for a Johnson v. Mississippi claim. Review by this Court is therefore necessary.

The Eleventh Circuit's decision/analysis is also contrary to this Court's decision in Griffin v. United States, 502 U.S. __, 116 L.Ed.2d. 371, 112 S.Ct. __ (1992). When faced with two separate theories of proof, one supported by the evidence, the other one not, this Court refused to speculate or presume that a jury would rely on a theory with insufficient evidence to sustain the findings. Griffin, 502 U.S. __, 116 L.Ed.2d at 380-81. The panel presumes that Duest's jury would not have found the aggravating factor of prior violent felony if they were not

told about the aggravated assault with intent to murder. This analysis presumes that the jury would have ignored the prior conviction for armed robbery, even though they were instructed that the armed robbery was a sufficient basis for finding the aggravating factor.[11] That presumption is in direct conflict with Griffin. If one cannot presume that a jury would erroneously convict absent sufficient proof, a fortiori, one cannot presume a jury would erroneously refuse to consider a factor which is supported by the evidence.[12] To suggest that simply

---

[11] The jury was told: "You are instructed that the crimes of armed assault to murder and armed robbery are felonies involving the use or threat of violence to another person.

[12] The panel's decision makes much of the fact that the jury requested to see a copy of the prior convictions. Duest v. singletary, 967 F.2d 472, 481-482 (11th Cir. 1992). Petitioner fails to

because there was insufficient evidence of intent to murder when Duest assaulted the police officers with a dangerous weapon, a jury would then ignore the armed robbery and not recommend death is mere speculation.

Lastly the panel's decision is contrary to Sochor in that the harmless error analysis was incomplete. Once the panel speculated that the jury was more persuaded by one portion of evidence over another piece of evidence, i.e., the aggravated assault with intent to murder weighed more heavily in the jurors's minds than did the armed robbery, the panel assumed that its

---

see how this supports the panel's decision. The jury requested to see both of the prior convictions. This would lend support to Petitioner's claim that the jury did not place any greater emphasis on the aggravated assault conviction than it did on the armed robbery. Indeed both crimes involve violence.

analysis was complete. The panel was in error. Sochor illustrates that consideration as to what the sentencing judge found and weighed in its death determination is critical in a harmless error review given the trial court's role in sentencing. Id, 504 U.S.at __, 119 L.Ed.2d at 341-342.[13] If the panel had considered the trial court's original sentencing order (State trial court sentencing order, dated April 14, 1983, pg. 1), and the trial court's order denying this claim in the collateral proceeding (State trial court's order denying Rule 3.850 relief, dated January 5, 1990, pg. 2), it would

---

[13] The judge is the actual sentencer in Florida and is required to make specific written factual findings in support of a death sentence. Section 921.141(3), Fla. Stat. Grossman v. State, 525 So.2d 833 (Fla. 1988); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984).

not have had to speculate as to what weight was given any particular evidence. The trial court,[14] held that the error was harmless as Duest had also been convicted of armed robbery. The trial court determined that since the armed robbery was sufficient to satisfy the aggravating factor of prior violent felony,[15] Duest would still have been sentenced to death (State trial court's order denying Rule 3.850 relief, dated January 5, 1990, pg. 2). Given that the actual sentencer has stated that death would still have been imposed because of the remaining prior violent conviction,

---

[14] The trial judge who presided over appellant's collateral proceedings is the same judge who sentenced Duest to death.

[15] Under Florida law, a single prior conviction with violence proves this aggravating fdactor beyond a reasonable doubt.

there is no need to engage in any speculation.

The Florida Supreme Court unequivocally stated that absent the prior conviction there still exist a basis for the aggravating factor, consequently the error was harmless beyond a reasonable doubt. Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990). The Court further noted that even if the aggravating factor was found to be invalid, the death sentence was still the appropriate penalty. Id.[16] The district court, in making a de novo review of the Florida Supreme Court's analysis under Chapman v. California,

---

[16] A review of the Florida Supreme Court's opinion reveals that the Court did in fact conduct a harmless error analysis, consequently any other reviewing court is not faced with any ambiguity. See Sochor v. Florida, 504 U.S. __, 119 L.Ed.2d 326, 341-342, 112 S.Ct. __ (1992).

386 U.S. 18 (1967), determined that the error was in fact harmless beyond a reasonable doubt. The district court correctly concluded that since there still remained a prior conviction to satisfy the finding of that aggravator, the error was harmless. Furthermore, the state did not emphasize either of the two prior convictions as was the case in Johnson. Consequently, the district court, applying the proper harmless error standard, found that Duest would still have been sentenced to death absent a portion of one of the four aggravating factors that existed.

In summary, the panel's analysis was faulty and incomplete. Furthermore, the court's refusal to find harmless error is incorrect. The court's fixation with the fact that the jury mistakenly was told that Duest intended to murder the

two police officers during his aggravated assault upon them is unreasonable. The panel's erroneous analysis is highlighted by the court's acknowledgment that Duest did in fact commit the crime of aggravated assault. The evidence was simply insufficient to prove that he intended to kill them when he shot at them. In essence, the panel concluded that a defect in some of the evidence presented to support a factor that still remained[17] absent the defect, coupled with three other aggravating factors is not harmless error.[18]

---

[17] There has been no successful challenge to the prior conviction for armed robbery.

[18] Contrary to the panel's assertion otherwise, Duest v. Singletary, 967 F.2d 472, 842 n. 11, the State never suggested, let alone conceded, that the evidence presented at sentencing would have resulted in a life recommendation, nor that same would have precluded an override of that recommendation. The panel's statement otherwise, is patently

Ironically, the prosecutor only needed one of these prior convictions to prove this factor, consequently there could not possibly have been any error if the jury had only been told of the one prior conviction for armed robbery. The aggravating factor would still have been found and Duest would still have been sentenced to death. The panel's decision to ignore the findings of the sentencing court[19] and reverse the findings of two other reviewing courts is unreasonable. The analysis employed

---

inaccurate. This mischaracterization is further exacerbated by the panel's sua sponte determination that the mitigating evidence would have precluded a jury override. Such a determination was made without the benefit of any state court's interpretation of state law as it applies to the instant case. Francis v. Dugger, 908 F.2d 595, 704 (11th Cir. 1990).

[19] See trial court's order denying Rule 3.850 relief dated January 5, 1990, page two.

by the circuit court is tantamount to per se reversible error involving any Johnson v. Mississippi claim.

The decision to presume/speculate as to what weight the jury gave to appellant's aggravated assault with intent to murder violates Sochor and Griffin. Furthermore the panel's failure to take into account the findings of the actual sentencer also violates Sochor.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that the petition for writ of certiorari be granted and a summary reversal entered based on Griffin and Sochor, supra.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Asst. Attorney General

DEPT. OF LEGAL AFFAIRS
111 Georgia Avenue
Suite 204
West Palm Beach, FL 33401
(407) 837-5062

Counsel for Appellee

CASE NO. _____
THE SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY, Jr.,

Petitioner,

v.

LLOYD DUEST,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INDEX TO APPENDIX

Duest v. Singletary,
967 F.2d 472 (11th Cir.1992) A1-A62

Opinion
United States District Court
Southern District of Florida
September 14, 1990 A63-173

Duest v. Dugger,
555 So.2d 849 (Fla. 1990) A173-A198

Duest v. State,
462 So.2d 446 (Fla. 1985) A199-A212

LLOYD DUEST, Petitioner-Appellant,

v.

HARRY K. SINGLETARY, JR., Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 90-6009.

United States Court of Appeals, Eleventh Circuit

July 15, 1992.

After his conviction of first-degree murder and death sentence were affirmed on direct appeal, 462 So.2d 446, and denial of his request for postconviction relief was affirmed, 555 So.2d 849, petitioner sought habeas relief. The United States District Court for the Southern District of Florida, No. 90-6045-CIV, Kenneth L. Ryskamp, J., denied petition, and petitioner appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) failure to

disclose bus ticket that would have corroborated portion of petitioner's alibi defense was not Brady violation, but (2) jury's consideration of conviction and sentence that was later vacated was reversible error under Eighth Amendment.

Conviction affirmed; denial of writ reversed, death sentence vacated, and matter remanded.

Martin J. McClain, Tallahassee, Fla., for petitioner-appellant.

Celia A. Terenzio, Asst.Atty.Gen.,West Palm Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

Petitioner Duest was convicted of the first-degree murder of John Pope and sentenced to death. The Florida Supreme Court affirmed Duest's conviction and sentence on direct appeal, Duest v. State, 462 So.2d 446 (Fla. 1985), and denied all post-conviction relief. Duest v. Dugger, 555 So.2d 849 (Fla. 1990). Duest now appeals from the district court's denial of a writ of habeas corpus, which petitioner sought on several grounds. We affirm the district court's denial of relief with respect to Duest's conviction for first-degree murder. Because, however, the sentencing jury's consideration of a conviction and sentence later vacated by the Commonwealth of Massachusetts constituted reversible error under the Eighth Amendment and Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct.

1981, 100 L.Ed.2d 575 (1988), we vacate Duest's death sentence and remand to the district court.

I. BACKGROUND AND COURSE OF PROCEEDINGS

John Pope was last seen alive on February 15, 1982 (President's Day), in Ft. Lauderdale, Florida, and was found dead early the following morning. Duest was arrested April 18, 1982, and on May 21, 1982, was charged by indictment with Pope's murder. During the March 1983 trial, held in Broward County, Florida, Duest relied on an alibi defense, presenting both testimonial and documentary evidence that he had been in Massachusetts throughout President's Day Weekend (February 13-15) 1982 and until April 5, 1982, on which date he had arrived in Florida on a Trailways bus. In response, the prosecution presented

seven witnesses, all of whom testified that they had seen Duest in the Ft. Lauderdale area during President's Day Weekend, and some of whom testified that they had seen Duest with Pope hours before the latter was found dead. Although the prosecution suggested that Duest's alibi witnesses had merely confused the dates of his appearance in and departure from Massachusetts, the prosecution never explicitly argued that Duest had not been in Massachusetts on April 5. The jury convicted Duest of first-degree murder on March 18, 1983.

On the following day, the penalty phase of the proceedings commenced. At this time, the government sought, inter alia, to show that Duest's prior criminal record contained two convictions for crimes of violence.

Under Florida law, such crimes constitute an aggravating circumstance to be weighed by a sentencing jury against evidence of statutory and nonstatutory mitigating evidence. Fla.Stat.Ann. §921.141(5)(b).[1] To establish this aggravating circumstance, the prosecution introduced into evidence two convictions from the Commonwealth of

---

[1] Florida is a "weighing" state. In the sentencing phase of a capital trial, the jury must determine (1) whether sufficient aggravating circumstances exist as enumerated in Fla.Stat.Ann. §921.141(5), (2) whether mitigating circumstances, both statutory and nonstatutory, exist which outweighed the aggravating circumstances, and (3) based on this calculus, whether death is the appropriate sentence. Fla.Stat.Ann. §921.141(2). Unlike other weighing states such as Mississippi, however, the sentence reached by a Florida capital jury is purely advisory. Under Fla.Stat.Ann. §921.141(3), the trial court, the sentencer under Florida law, must itself ultimately weigh aggravating and mitigating circumstances in determining whether death is the appropriate sentence. Fla.Stat.Ann. §921.141(3).

Massachusetts: one for armed robbery, and the other for armed assault with intent to murder.[2] After the introduction of the second conviction, the sentencing court spoke to the jury as follows:

> State's Exhibit No. 2 is a certified copy from the Commonwealth of Massachusetts, Superior Court, Department of the Trial Court. This is a conviction for armed assault to murder. The defendant pled guilty on January 13, 1971, and was sentenced to a term not exceeding ten years, nor less than five years. I

---

[2] Duest had pled guilty to both crimes.

will read this Indictment to you, also. It says, "Commonwealth of Massachusetts. The Superior Court. At the City of Cambridge, within and for the County of Middlesex, on the first Monday of April, in the year of our Lord one thousand nine hundred and seventy, the jurors for the Commonwealth of Massachusetts on their oath present that Lloyd Paul Duest on the 4th day of March in the year of our Lord one thousand nine hundred and seventy, at Reading, in the County of Middlesex, aforesaid being

> armed with a dangerous weapon, did assault Herbert McSheehy and Leo Iacopucci...with intent to murder them against the peace of said Commonwealth and contrary to the Statute in such case and provided..."

Trial Transcript at 1574-75. The court gave to the jury no additional facts regarding this conviction other than those contained in the Indictment.

After the jury returned from deliberating over Duest's sentence, it asked to see the criminal records pertaining to Duest's Massachusetts convictions. Id. at 1631. The court proceeded to re-read to the jury each indictment and notice of guilty plea and

sentence. Id. at 1631-33. After this second reading, the jury returned to its deliberations, and subsequently recommended a sentence of death by a seven to five vote. It is not clear from the record how much time elapsed between the time the court re-read the prior convictions to the jury and the time that the jury recommended death; the sentencing phase, however, lasted only one day. On April 24, 1983, the trial court accepted the jury's recommendation and sentenced Duest to death. The trial court found four aggravating factors to exist, including the "prior crimes of violence" circumstance listed in Fla.Stat.Ann. §921.141(5)(b), and none of the statutory mitigating factors listed in Fla.Stat.Ann. §921.141(6).

The Florida Supreme Court affirmed Duest's first-degree murder conviction and death sentence. Duest v. State, 462 So.2d 446 (Fla. 1985). Subsequently, the Massachusetts Court of Appeals vacated Duest's conviction for armed assault with intent to murder on the grounds that the indictment did not charge Duest with conduct sufficient to prove he acted with intent to murder. Commonwealth v. Duest, 26 Mass. App.Ct. 137, 524 N.E.2d 1368 (1988).[3] On

---

[3] Duest's 1988 appeal involved his attempt to withdraw his pleas as to both of the aforementioned convictions. Under Commonwealth v. Henson, 394 Mass. 584, 476 N.E. 2d 947 (1985), a case decided after Duest's conviction but given retroactive effect, Massachusetts treated armed assault with intent to murder as attempted murder, requiring proof of intent. Duest argued that the indictment charging assault with intent to murder did not reflect evidence of intent to murder. The Commonwealth of Massachusetts agreed with Duest's contention in light of Henson; therefore, the Massachusetts Court of Appeals accepted the withdrawal of

October 20, 1988, the armed assault charge against Duest was nolle prossed. Duest then moved for post-conviction relief under Fla.R.Crim.P. 3.850, alleging, inter alia, that the sentencing jury's consideration of Duest's vacated prior conviction in Massachusetts was invalid, and that resentencing was required. While conducting discovery after the filing of that motion, Duest's counsel discovered in the State files containing Duest's personal effects a Trailways bus ticket, bearing no name, showing travel from Boston to Ft. Lauderdale on April 5, 1982. Duest proceeded to amend his 3.850 motion to include a claim that the government, by withholding the bus ticket, had withheld material

---

Duest's plea and accordingly vacated his conviction.

exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed.2d 215 (1963), and that therefore a new trial was necessary. On January 4, 1989, the trial court held evidentiary hearings on the Brady issue and on Duest's claim that the jury's consideration of the vacated Massachusetts conviction required resentencing, but ultimately denied Duest all.relief on the 3.850 motion. At the hearings, the State conceded that the defendant had put on a wealth of non-statutory mitigating evidence at trial.

Duest then petitioned for a writ of habeas corpus in state court, alleging, inter alia, (1) the Brady violation referred to supra, as well as other Brady claims; (2) that the sentencing jury's improper consideration of a prior

conviction that had subsequently been vacated by the Massachusetts courts entitled Duest to a new sentencing proceeding, under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); and (3) ineffective assistance of counsel at the guilt, sentencing and appellate phases of the proceedings.

The Florida Supreme Court denied habeas relief and affirmed the trial court's denial of Duest's motion for Rule 3.850 post-conviction relief. Duest v. Dugger, 555 So.2d 849 (Fla. 1990). On the Brady issue, the Court held that although the State had inadvertently failed to furnish the bus ticket to the defense, the introduction of the ticket would not have affected the outcome of the case, given the jury's complete rejection of Duest's

alibi defense. Duest v. Dugger, 555 So.2d at 850-51. The Court also rejected Duest's claim under Johnson v. Mississippi, stating that it "believe[d] beyond a reasonable doubt that Duest would still have received a sentence of death without evidence of [the vacated] conviction." Id. at 851. The Florida Supreme Court also denied relief on the remainder of Duest's claims.

Duest then petitioned for habeas relief in Federal District Court, asserting 25 different claims. In an Order dated September 19, 1990, the district court denied relief on all claims, holding that some of the claims were procedurally barred, and that others had no merit. Duest v . Dugger, No. 90-6046-CIV-RYSKAMP-(S.D.Fla. Sept. 19, 1990) (hereinafter "September 19 Order"). Duest appeals the district

court's determination as to several of these claims. Specifically, Duest makes the following arguments before this court:

(1) Duest is entitled to a new trial in light of the government's withholding of material exculpatory evidence under Brady (Issue I);

(2) Resentencing is appropriate because of the sentencing jury's impermissible consideration of the vacated Massachusetts conviction (Issue II);

(3) An evidentiary hearing on the issue of ineffective assistance of counsel at sentencing must be held in district court (Issue III).

(4) Duest was denied effective assistance of counsel at trial by virtue of his lawyer's failure to object to improper prosecutorial statements during the guilt and sentencing phases (Issue IV);

(5) Duest was denied effective assistance of appellate counsel by virtue of appellate counsel's failure to raise several different issues on appeal (Issue V);

(6) There was insufficient evidence to convict Duest of first-degree murder (Issue VI);

(7) The trial court committed reversible error at sentencing by issuing insufficient instructions regarding

aggravating factors, in violation of Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct.1853, 100 L.Ed.2d 372 (1988) (Issue VII);

(8) Duest's was denied his right to a fair trial because of the introduction at trial of flight evidence and evidence of Duest's use of an alias (Issue VIII);

(9) the trial court committed reversible error at sentencing when it instructed the jury that a majority vote (seven of twelve jurors) was needed to return a verdict of life imprisonment as opposed to death (Issue IX); and

(10) Resentencing is appropriate because the trial

court's penalty phase instructions impermissibly shifted the burden of proof to Duest to prove that life imprisonment was the appropriate punishment (Issue X).

As noted supra, we affirm the district court's denial of habeas relief regarding Duest's conviction, but reverse the district court's denial of relief regarding sentencing.

II. DUEST'S CONVICTION

Duest makes several claims regarding the alleged unlawfulness of his conviction, including those claims identified supra as Issue I (the Brady violations); Issue IV to the extent the prosecutorial misstatements took place at the guilt phase of the trial); Issue V (to the extent that appellate counsel

failed to raise on appeal issues arising out of the guilt phase of the trial); Issue VI (sufficiency of the evidence); and Issue VIII (erroneous admission of flight evidence and evidence of use of an alias).

Because Duest's Brady claim is the sole claim pertaining to Duest's conviction that merits extended treatment here, we reserve that discussion for last, and address Duest's other claims first.

A. Ineffective Assistance of Counsel - Guilt Phase (Issue IV)

[1-3] With respect to Duest's claim that he was denied ineffective assistance of trial counsel at the guilt phase by virtue of his counsel's failure to object to improper prosecutorial statements, we note that in order to prove ineffective assistance of counsel, a habeas petitioner must show that his

lawyer performed deficiently, and that such deficient performance prejudiced his client. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); United States v.Yizar, 956 F.2d 230, 232 n.8 (11th. Cir. 1992). An ineffective assistance of counsel claim presents a mixed question of law and fact and is therefore subject to de novo review. Lusk v. Dugger, 890 F.2d 332, 336 (11th. Cir.), cert. denied, ___U.S.___, 110 S.Ct. 3297, 111 L.Ed.2d 805 (1990).

[4] In this case, whether or not trial counsel behaved deficiently, his failure to object to the prosecutor's allegedly improper statements did not prejudice his client. To prove prejudice, petitioner must show that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Yizar, 956 F.2d at 232 n. 13 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068). Prosecutorial misstatements do not constitute reversible error unless such misstatements render the trial so fundamentally unfair as to amount to a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 645, 94 S.Ct 1868, 1872, 40 L.Ed.2d 431 (1974). Given the nature of the (mis)statements in this case, the prosecutor's behavior in this case did not render Duest's trial so fundamentally unfair as to amount to a denial of due process. Thus, any objection by defense counsel

would have proven fruitless. Defense counsel's failure to object to these statements were not ineffective assistance.

B. Ineffective Assistance of Appellate Counsel (Issue V)

[5] With respect to Duest's allegations on ineffective assistance of appellate counsel for failure to raise on appeal claims arising out of the guilt phase of Duest's trial, it is claim that the petitioner has not sustained his burden of proving prejudice resulting from appellate counsel's alleged deficient performance. See Strickland, supra.[4] In assessing

---

[4] The standard of proof and standard of review are the same in the context of ineffective assistance of appellate counsel as in the context of ineffective assistance of trial counsel. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291(1984).

the likelihood of success of a direct appeal, we must accord deference to the Florida Supreme Court's decisions to the extent the Court has decided one of the underlying state law issues giving rise to the ineffective assistance claim. Alvord v. Wainwright, 725 F.2d at 1291. Duest contends that appellate counsel was ineffective for failing to raise on appeal (1) the trial court's admission of flight evidence at trial; and (2) the trial court's admission of collateral misconduct.

In denying Duest state habeas relief and in affirming the trial court's denial of Duest's 3.850 motion, however, the Florida Supreme Court addressed petitioner's substantive state law claims on the merits. The court concluded that under prevailing Florida

law, petitioner's arguments regarding the admission of flight and alias evidence "would have been unavailing had it been raised on appeal." Duest v. Dugger, 555 So.2d at 852, and that the admission of collateral conduct was, at most, harmless error. Id. at 853. Thus, given the Florida Supreme Court's rejection of Duest's underlying state claims, no prejudice resulted from the failure of Duest's appellate counsel to raise these claims on appeal.

C. Insufficient Evidence of First-Degree Murder (Issue VI)

[6] We find no merit to Duest's contention that there was insufficient evidence to convict him of first-degree murder. To prevail on a sufficiency of the evidence claim, petitioner must show that, viewed in the light most favorable to the prosecution, the evidence in this

case could not have permitted a reasonable trier of fact to conclude that Duest was guilty beyond a reasonable doubt of first-degree murder. Jackson v. Virginia,443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Petitioner cannot make such a showing in this case.

D. Introduction of Flight/Alias Evidence (Issue VIII)

[7] The Florida Supreme Court relied on an independent and adequate state procedural ground - that is, Duest's failure to raise the issue of improper introduction of flight and alias evidence on direct appeal - in denying relief on this claim. Duest v. Dugger, 555 So.2d at 851. Therefore, Duest is procedurally barred from raising this claim in a federal habeas proceeding. Wainwright v. Sykes, 433 U.S. 72, 81-83,

97 S.Ct. 2497, 2503-04, 53 L.Ed.2d 594 (1977).[5]

E. Brady Violation (Issue I)

[8,9] In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." Brady, 373 U.S. at 87, 83 S.Ct. at 1197. In United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court noted that "evidence is material only if there

---

[5] As noted in Section II.B, supra, Duest also raises claims in the context of his claim of ineffective assistance of appellate counsel. As discussed therein, the claims have no merit.

is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682, 105 S.Ct. at 3383.

[10] Under the law of this circuit, a defendant seeking to establish a Brady violation must prove (1) that the government possessed evidence - which may include impeachment evidence - favorable to the defense; (2) that the defendant did not possess the evidence, and could not obtain it with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of

the proceedings would have been different. United States v. Meros, 866 F.2d 1304, 1308 (11th.Cir.), cert. denied, 493 U.S. 932, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989). There is no question but that the first three of these requirements have been met in this case.[6] The question is whether, had the evidence been disclosed to the defense, a reasonable probability existed that

---

[6] The third prong of the Meros test does not require that proof of "suppression" of the alleged Brady Material be accompanied by evidence of deliberate withholding of such evidence by the State. "The Supreme Court has recognized that 'suppression' for purposes of a Brady analysis is not 'measured by the moral culpability, or the willfulness of the prosecution.'" United States v.Spagnoulo, 960 F.2d 990 (11th.Cir. 1992) (quoting United States v.Agurs, 427 U.S. 97, 110, 96 S.Ct.2392, 2400, 49 L.Ed.2d 342 (1976). Thus, although the parties dispute whether the State deliberately or inadvertently withheld the bus ticket from the defense, this dispute is of no significance for Brady purposes to the question of whether evidence was suppressed.

the outcome of the proceedings would have been different. This issue presents a mixed question of law and fact, reviewable de novo. See United States v. Rivalta, 925 F.2d 596, 597-98 (2d Cir.), cert.denied, ___U.S.___, 112 S.Ct. 215, 116 L.Ed.2d 173 (1991).

Duest has presented several Brady claims based on the failure of the State to furnish to the defense various witness statements that, Duest argues, could have been used to impeach the State's witnesses at trial. Although such impeachment evidence falls within the Brady rule under Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct.763, 766, 31 L.Ed.2d 104 (1972), none of the statements sought by the defense in any way raised the possibility that the outcome of the trial would have been different.

Accordingly, we reject Duest's Brady claims with respect to these statements. Duest's claim regarding the April 5 bus ticket merits more extended discussion.

Duest contends that the April 5 Trailways bus ticket served to bolster the contentions of the defense that Duest had been in Massachusetts during President's Day Weekend 1982 and through April 5, 1982, the date on which, according to the defense, Duest left Boston for Ft.Lauderdale. Duest suggests that because the prosecution focused on the credibility of Duest's alibi witnesses, the existence of the bus ticket would have enhanced the credibility of these witnesses such that a reasonable probability exists that the jury would have accepted Duest's alibi. We disagree.

As noted by the Florida Supreme Court, the prosecution presented seven witnesses who testified that Duest had been in Ft. Lauderdale on President's Day Weekend. These witnesses included a man who allegedly had sat next to Duest on the two-day bus trip from New York to Ft. Lauderdale that landed Duest in Florida on President's Day weekend, as well as women with whom Duest allegedly shared an apartment in Florida that weekend. The jury clearly believed these witnesses rather than Duest's alibi witnesses, most of whom were family members or friends. The existence of the April 5 bus ticket in no way impeaches the testimony of the prosecution's witnesses, in that the ticket indicates only that someone traveled from Boston to Ft. Lauderdale on April 5, and says nothing about

Duest's whereabouts during the President's Day Weekend.

Admittedly, the existence of the ticket serves to corroborate the testimony of Duest's parents that they put him on a Ft. Lauderdale-bound bus in Boston on April 5. None of Duest's alibi witnesses, however, testified that Duest was in Boston the entire period between February and April 1982. Thus, the existence of the bus ticket in no way contradicts the prosecution's contention, accepted by the jury, that Duest was in Ft. Lauderdale, on President's Day Weekend. At oral argument, Duest's counsel conceded that the prosecution never argued explicitly that Duest had not been in Massachusetts on April 5.

The fact that the bus ticket serves to corroborate a part of Duest's story that is not directly relevant to the crime charged does not justify a finding for Duest on the fourth prong of the Meros test. In United States v. Booz, 451 F.2d 719 (3d Cir. 1971), the Third Circuit addressed a situation similar to the one posed in this case. In Booz, the prosecution suppressed evidence in the form of statements by local townspeople corroborating the defendant's story as to his whereabouts between 9:30 AM and 10:00 AM the day of a bank robbery for which he was charged. The court found that no Brady violation occurred because the bank robbery had occurred between 8:30 AM and 9:00 AM: "[e]vents occurring later in the day...could lend no support to appellant's case." Booz, 451 F.2d t

725. Thus, even though the withheld statements in Booz served to corroborate a portion of the defendant's story, they did not corroborate the portion of the story involving the defendant's whereabouts at the time of the crime. If corroboration of events occurring an hour after commission of the crime lend no support to a defendant's case, corroboration of events occurring months after commission of a crime can have even less relevance to a defendant's case.

Finally, we note that the jury rejected alibi evidence as to Duest's whereabouts on President's Day Weekend that was more compelling than the April 5 bus ticket. The jury failed to be swayed by introduction of an auto parts store receipt from Watertown,

Massachusetts, dated February 15, bearing the name of "Duest."[7] As stated by the District Court in its September 19 Order, "[u]nder Bagley, there is no reasonable probability that an April bus ticket would have convinced the jury that Duest did not commit the February murder, when the jury did not believe a hardware store owner who produced a February receipt that purportedly showed that Duest was in Massachusetts when Pope was killed." September 19 Order at 12.

Accordingly, we reject Duest's Brady claims in their entirety. Because we also reject the remainder of Duest's claims as they pertain to his conviction

---

[7] The receipt did not include a first name. The store owner, however, testified that the defendant himself was a party to the February 15 transaction reflected on the receipt.

for first-degree murder, we affirm the district court with respect to Duest's conviction for first-degree murder.

III. DUEST'S SENTENCE

Duest also challenges his death sentence on a number of different grounds, including those grounds identified supra as Issue II (the Johnson v. Mississippi claim relating to Duest's vacated prior conviction); Issue III (ineffective assistance of counsel at sentencing); Issue IV (to the extent the prosecutorial misstatements took place at the penalty phase of the trial); Issue V (to the extent that appellate counsel failed to raise on appeal issues arising out of the penalty phase of the trial); Issue VII (insufficient instructions at sentencing phase on "heinous, atrocious and cruel"

aggravating circumstance); Issue IX (erroneous instructions regarding votes necessary for a life sentence); and Issue X (improper burden-shifting instruction at penalty phase). Because we agree with Duest that resentencing is appropriate on the ground raised in Issue II, we need not reach the other issues raised by Duest pertaining to his sentence.

Duest's Johnson v. Mississippi Claim (Issue II)

As noted supra, Duest contends that because the sentencing jury's recommendation of death was based upon consideration of a criminal conviction that was later vacated by the Massachusetts courts, resentencing is in order under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Two questions must be

answered in order to decide Duest's claim. First, did the sentencing jury's consideration of Duest's prior vacated conviction amount to Eighth Amendment error under Johnson? Second, if so, did the Florida Supreme Court err in concluding that the Eighth Amendment error was harmless?

A. Eighth Amendment Error

[11] In Johnson, the sentencing jury found three aggravating circumstances regarding Johnson's murder of a Mississippi highway patrolman, one of which was that Johnson had "previously been convicted of a felony involving the use or threat of violence of the person of another." [8] The sole evidence supporting this aggravating circumstance

---

[8] Mississippi, like Florida, is a "weighing" state. See note 1, supra.

was an authenticated copy of petitioner's commitment following his 1963 conviction in New York State for second-degree assault with intent to commit first-degree rape. The prosecutor repeatedly referred to this conviction during sentencing. Because the three aggravating circumstances outweighed the mitigating circumstances, the Mississippi jury, the sentencer under Mississippi law, sentenced Johnson to death. In 1987, after the Mississippi jury passed its sentence, the New York Court of Appeals reversed Johnson's conviction for second-degree assault with intent to commit first-degree rape on the grounds that Johnson's confession was coerced.[9]

---

[9] The reasons for the 24-year delay between Johnson's New York conviction and the New York Court of Appeals' reversal are irrelevant to the issue before us.

Despite the sentencing jury's consideration of this invalid conviction, the Mississippi Supreme Court affirmed Johnson's death sentence.

The United States Supreme Court reversed and remanded the case to the state courts for resentencing. The Court held that the sentencing jury's consideration of the invalid conviction violated the Eighth Amendment because the decision to sentence Johnson to death was predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Johnson,486 U.S. at 585, 108 S.Ct. at 1986 (quoting Zant v. Stephens, 462 U.S. 862; 884-85, 887 n. 24, 103 S.Ct. 2733, 2747, 2748 n. 24, 77 L.Ed.2d 235 (1983).

Thus, Johnson stands for the proposition that a sentencing jury's consideration of a vacated conviction in establishing aggravating factors violates the Eighth Amendment because such consideration undermines the "need for reliability in the determination that death is the appropriate punishment." Id. at 584, 108 S.Ct. at 1986 (citations omitted). In assessing Duest's Johnson claim, the Florida Supreme Court implicitly recognized the existence of an Eighth Amendment violation. Duest v. Dugger, 555 So.2d at 851. The State does no dispute the existence of Constitutional error in this case.

B. Harmless Error

[12-14] Before examining whether the Eighth Amendment error in this case was harmless, we note that federal courts

are not bound by state court determinations as to whether Constitutional error is harmless. Jackson v. Dugger, 931 F.2d 712, 717 (11th.Cir.), cert. denied sub nom. Singletary v. Jackson, ___U.S.___, 112 S.Ct. 452, 116 L.Ed.2d 470 (1991). Whether such error rises to the level of reversible error is a mixed question of law and fact, reviewable de novo. Id.

In Johnson, the State opposed Johnson's request for resentencing, arguing that because the Mississippi Supreme Court had concluded that the death sentence returned by the jury would have stood even absent Johnson's New York conviction, such resentencing was inappropriate. The United States Supreme Court rejected this argument. First, the Court noted that the Mississippi Supreme Court had expressly

refused to conduct a harmless error analysis, and that such refusal was appropriate, given that the prosecution had focused upon that aggravating factor far more than on the others. Johnson, 486 U.S. at 590 n. 8, 108 S.Ct. at 1988-89 n. 8. Second, and "more importantly," the Court noted that "the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible." Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Id. at 590, 108 S.Ct. at 1989.

As noted supra, the Florida Supreme Court rejected Duest's Johnson claim because it "believe[d] beyond a reasonable doubt that Duest would still

have received a sentence of death without evidence of [the vacated] conviction." - Duest v.Dugger, 555 So.2d t 851. [10] The Court noted that even if Duest's vacated Massachusetts conviction were not considered by the sentencing jury, (1) another conviction for armed robbery remained extant, thereby preserving the existence of the "prior crimes of violence" aggravating circumstance; and(2) three other aggravating factors existed independent of the "prior crimes of violence"

---

[10] This is the proper standard by which a court measures whether a constitutional violation is harmless error. Clemons v. Mississippi,494 U.S. 738, 753, 110 S.Ct. 1441, 1451, 108 L.Ed. 2d 725 (1990); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). We agree with the district court in this case that the Florida Supreme Court conducted a harmless error analysis rather than independently reweighing the aggravating and mitigating circumstances. September 19 Order at 16-17.

factor. Id. The State, of course, agreed with the Florida Supreme Court, adding that, unlike the sentencing jury in Johnson, the sentencing jury in this case received only limited exposure to the vacated conviction: the prosecution never mentioned the conviction during the sentencing phase, and the court merely read and later re-read the indictments to the jury.

Notwithstanding the Florida Supreme Court's analysis, and the contentions of the State, we hold that the Eighth Amendment error resulting from the sentencing jury's consideration of Duest's vacated Massachusetts conviction was not harmless.

The Supreme Court's decisions in Johnson,. supra and Clemens v.

Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), supports our holding, and help us identify the specific reasons why the Eighth Amendment error in this case was not harmless. As noted supra, the Johnson Court stated that, had the Mississippi Supreme Court conducted a harmless error review of the sentencing jury's consideration of Johnson's vacated New York conviction, such review would have yielded a determination that the error was not harmless. First, the Court pointed out that the prosecutor's focus on the vacated conviction made the jury's reliance on that conviction especially likely. Johnson, 486 U.S.at 590 n. 8, 108 S.Ct. at 1989 n. 8. The Court in Clemons likewise concluded that where the State "repeatedly emphasized and argued the [constitutionally

impermissible aggravating factor] during sentencing,...it would require a detailed explanation based on the record for us to agree that the error in giving the invalid...instruction was harmless." Clemons, 494 U.S. at 753-54, 110 S.Ct. at 1451.

Although the jury in this case received less exposure to the vacated conviction, than did the jury in Johnson, the circumstances surrounding the jury's consideration of this conviction indicate that reversible error occurred here as well. The fact that the jury requested to see the vacated convictions after having deliberated for a time suggests strongly that this particular evidence played a significant role in the jury's ultimate determination that death was the

appropriate sentence. It is important to note that the jury did not request additional information or instruction from the trial court on any other matter. It is unclear from the record how much time elapsed between the jury's request and its arrival at a recommendation of death; nevertheless, the fact that the entire sentencing hearing took only one day, combined with the other circumstances surrounding the jury's determination, further calls into question the reliability of the jury's recommendation. Finally, that the jury recommended death by the narrowest of margins renders its consideration of the vacated conviction especially problematic. Thus, the context in which the sentencing jury considered Duest's conviction undermines confidence in the jury's recommendation of death as much

as the context in which the jury imposed death in Johnson.

The Johnson Court rejected a finding of harmless error not only because of the jury's particular exposure to Johnson's vacated conviction, but also because "the error [in Johnson] extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." 486 U.S. at 590, 108 S.Ct. at 1989. The Clemmons Court reemphasized this distinction in holding that the Mississippi Supreme Court was not precluded from conducting a harmless error analysis on remand where the trial court, rather than admitting inaccurate and misleading

evidence, merely had given an erroneous instruction regarding application of the "especially heinous atrocious and cruel" aggravating circumstance. Clemons, 494 U.S. at 754-55 n. 5, 110 S.Ct. at 1451 n. 5.

The Distinction drawn by the Court in Johnson and Clemons compels reversal here. Duest's sentencing jury was allowed to consider evidence that has been revealed to be materially inaccurate. Unlike the jury in Clemons, Duest's jury did not merely consider in an improper context evidence that had been admitted during the guilt phase; it considered evidence that incorrectly indicated that (1) Duest had been convicted of a crime involving violence, and that (2) the underlying conduct for which he was convicted reflected a

murderous intent. The fact that Duest may have committed some of the underlying conduct alleged in the indictment- that is, the armed assault - in no way renders harmless the effects such inaccuracies may have had on the jury. The implication that Duest had acted with murderous intent in committing armed assault might well have had particular impact on a jury considering whether to recommend life or death.

In Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987), this court stated that:

> If there remains a possibility that the constitutionally-proscribed evidence impacted on the ultimate decisional

> process of the jury, if the beneficiary of the error cannot refute that possibility beyond all reasonable doubt, constitutional errors can never be deemed harmless.

Id. at 1554 (citing Hutchins v. Wainwright, 715 F.2d 512, 517 (11th. Cir. 1983), cert. denied, 465 U.S. 1071, 104 S.Ct.1427, 79 L.Ed.2d 751 (1984). It is apparent that the jury's particular focus on the vacated conviction prior to its 7-5 recommendation of death raises a serious possibility that such evidence impacted the ultimate decisional process of the jury. Under the circumstances of this case, the State cannot show beyond a reasonable doubt that the jury would have recommended death absent consideration of the vacated

Massachusetts conviction.[11] Therefore, the sentencing jury's consideration of the vacated conviction amounts to reversible error.[12]

---

[11] It is equally apparent that, had the sentencing jury recommended life, the trial court would not have overridden this recommendation and sentenced Duest to death. As conceded by the prosecution, there was "plenty of nonstatutory mitigating evidence present in this case" to support a jury determination of life imprisonment in this case. Under Florida law, a sentencing court may not override a jury recommendation of life imprisonment if the jury recommendation has a reasonable basis. Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989). In this case, the nonstatutory mitigation would have furnished such a reasonable basis for a life recommendation.

[12] This case is different from Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991), cert. denied ___U.S.___, 112 S.Ct. 957, 117 L.Ed.2d 124 (1992), in which this court rejected a Clemons claim on the ground that the Florida Supreme Court's harmless error review was correct. This court held that, even after the Florida Supreme Court discounted three out of seven aggravating factors on the grounds that the trial court had misapplied the statutory criteria as to those factors, four aggravating circumstances remained,

---

as against one mitigating circumstance, and that therefore the Florida Supreme Court's harmless error analysis was correct. Kennedy, 933 F.2d at 911-12. Even though the balance of aggravating versus mitigating factors in this case is similar to the balance in Kennedy, given that three aggravating factors and no statutory mitigating factors were found by the trial court in this case, the cases are otherwise different, and underscore the distinction made by the United States Supreme Court in Clemons and Johnson. In Kennedy the information to which the jury was exposed was not materially inaccurate; indeed, as in Clemmons, the jury in Kennedy heard no evidence at sentencing that it could not have heard at any other point in the trial. This case, like Johnson and unlike Kennedy, involved (1) the jury's exposure to materially inaccurate information, (2) in a context which rendered that information particularly harmful to the defendant. Thus, the mere fact that the aggravating circumstances predominate over mitigating factors here in irrelevant given circumstances which undermine confidence in the jury's determination that death was the appropriate sentence. Johnson, 486 U.S. at 584, 108 S.Ct. at 1986.

For the foregoing reasons, we AFFIRM Duest's conviction for first-degree murder. We REVERSE the district court's denial of a writ of habeas corpus and VACATE Duest's death sentence. We REMAND the case to the district court for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT
56 Forsyth Street, NW
Atlanta, Georgia 30303

Miguel J. Cortez,
Clerk

October 7, 1992

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 90-6009 Duest v. Singletary
DC DKT NO.: 90-06045 CIV-KLR

The enclosed order has been entered on petition for rehearing.

See Rule,41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

Miguel J. Cortez, Clerk

Reply To: Joyce Pope (404) 331-2904

This order applies to both rehearings filed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-6009

LLOYD DUEST,

Petitioner-Appellant,

verses

HARRY K. SINGLETARY, Secretary.
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc,

and a majority of the judges in active service not having voted in favor it it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE

****

11th. Cir. R.41-1 **STAY OR RECALL OF MANDATE**

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion of rehearing en banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion of rehearing in banc is also treated as a petition for a panel rehearing under 11th Cir. R.35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing in banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

****

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-6045-CIV-RYSKAMP

LLOYD DUEST,

Petitioner,

v.

RICHARD L. DUGGER, Secretary
Florida Department of
Corrections,

Respondent.
_____/

MEMORANDUM ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Lloyd Duest filed this petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, challenging both his conviction for first degree murder and death sentence imposed April 14, 1983. The Florida Supreme Court described Duest's crime as follows:

On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriffs was contacted. Upon arrival, the deputy sheriff found Pope on the

bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Duest v. State, 462 So.2d 446, 448 (Fla. 1985).

After trial, the jury convicted Duest of first degree murder. The jury then voted 7-5 recommending that Duest receive the death penalty. The trial judge accepted the jury's recommendation and found the following aggravating circumstances as provided in the Florida Statutes: (1) Duest previously had been convicted of two violent felonies, armed robbery and assault with intent to commit murder, Fla. Stat. §921.141(5)(b); (2) the capital felony was committed while Duest was engaged in the commission of a robbery, Fla. Stat.

§921.141(5)(d); (3) the capital felony was committed for pecuniary gain, Fla. Stat. §921.141(5)(f); (4) the capital felony was especially heinous, atrocious, or cruel, Fla. Stat. §921.141(5)(h); (5) the capital felony was a homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, Fla. Stat. §921.141(5)(i). The trial judge considered circumstances (2) and (3) as one, because of overlapping facts and legal interpretations, finding a total of four aggravating circumstances that applied to Duest's crime. The trial judge found no mitigating circumstances and imposed a death sentence in accord with the jury's recommendation. Duest, 462 So.2d at 449 (discussing aggravating and mitigating circumstances).

On direct appeal, both Duest's conviction and sentence were affirmed by the Supreme Court of Florida. Duest, 446 So.2d 446. Duest did not file a petition for certiorari to the United States Supreme Court. Thus, his conviction became final on January 10, 1985, the date the state supreme court denied his direct appeal.

Following his direct appeal, Duest sought post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The state trial judge conducted an evidentiary hearing as to certain issues and eventually denied all relief. Duest appealed this ruling to the Supreme Court of Florida and also filed a petition for a writ of habeas corpus in that court under Fla. Stat. 879.01. The Florida Supreme Court denied all relief. Duest v. Dugger, 555 So.2d 849 (Fla. 1990).

Duest filed this petition for writ of habeas corpus on January 19, 1990. It is his first federal petition. That day, this court stayed Duest's execution. The court now considers Duest's 341-page petition, which raised the following 25 separate claims:

I. The State unconstitutionally withheld material exculpatory evidence and introduced false and misleading evidence.

II. Duest's death sentence was based on a vacated prior conviction and therefore also on misinformation of constitutional magnitude.

III. The judge and jury considered and relied on the victim's personal characteristics, the impact of the offense on the

victim's family, and the prosecutor's and family members' characterizations of the offense over defense counsel's timely objection.

IV. Duest was denied his right to trial by an impartial jury when the state introduced evidence of flight and evidence of Duest's use of an alias. The evidence and argument thereon was materially and intentionally inaccurate.

V. The sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, which was improperly argued and imposed.

VI. The "cold, calculated, and premeditated" aggravating

circumstance was unconstitutionally applied toDuest's case.

VII. The sentencing judge unconstitutionally refused to find mitigating circumstances clearly set out in the record.

VIII. The penalty phase jury was unconstitutionally instructed so as to shift the burden of proof to Duest and the judge used this improper standard in imposing the death penalty.

IX. The trial judge unconstitutionally asserted that sympathy and mercy toward Duest were inappropriate considerations.

X. The prosecutor and trial judge impermissibly diminished the juror's understanding of their

responsibility in the sentencing phase.

XI. The introduction of nonstatutory aggravating factors caused the death penalty to be imposed arbitrarily and capriciously.

XII. Duest's death sentence rests on an unconstitutional automatic aggravating circumstance.

XIII. Duest received ineffective assistance of counsel when his attorney failed to depose a potential state's witness because of a purported conflict of interest.

XIV. The state introduced statements taken in violation of Duest's constitutional rights and Duest received ineffective assistance of counsel in failing to suppress those statements.

XV. Duest received ineffective assistance of appellate counsel on direct appeal.

XVI. The state unconstitutionally introduced evidence of "other crimes" and undermined the reliability of the jury's determinations.

XVII. Defense counsel unreasonably and prejudicially misinformed the jury regarding the requisite burden of proof for establishing an alibi.

XVIII. Duest received ineffective assistance of counsel through failure to conduct an independent investigation and present compelling mitigating circumstances at sentencing.

XIX. Duest received ineffective assistance of counsel through

failure to object to or restrain inappropriate prosecutorial comments and argument and failure to argue the applicability of nonstatutory mitigation.

XX. The trial judge relied on a hearsay presentence investigation report and conducted the sentencing hearing in an unconstitutional manner, and Duest received ineffective assistance of counsel through failure to address those shortcomings.

XXI. Duest received ineffective assistance of counsel through a conflict of interest in rendering legal advice to Duest's alibi witnesses and was denied due process in that the

trial judge also provided legal advice and the state threatened these witnesses.

XXII. Insufficient evidence existed to convince a rational trier of fact that Duest was guilty of premeditated murder beyond a reasonable doubt.

XXIII. Florida imposes the death penalty based on impermissible, arbitrary, and discriminatory factors, including race.

XXIV. Duest was denied a full and fair forum in state court.

XXV. The trial judge unconstitutionally gave the sentencing jury an erroneous instruction regarding the number of votes required for a recommendation of a life-sentence.

First the court considers those claims that the Florida Supreme Court determined to be procedurally barred or waived. The court then considers the remaining claims in an order similar to that of the petition, although claims relating to ineffective assistance of counsel or conflict of interest are considered in the final section.

II. Claims Barred From Habeas Review Under An Adequate State Procedural Bar (Claims IV, VI, VII, XII, XVI)

The Florida Supreme Court found that five of Duest's claims were procedurally barred for failure to raise them on direct appeal and eleven were waived by his failure to properly present them in his appellate brief.

Generally, a state procedural bar precludes federal habeas review unless the petitioner establishes cause for his

default and that prejudice resulted from that default. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (contemporaneous objection rule embodied in Florida Rule of Criminal Procedure 3.190(i) barred federal habeas consideration of whether statements admitted were voluntary). Alternatively, the petitioner must demonstrate that "a fundamental miscarriage of justice" will result if the bar is applied. Murray v. Carrier, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397, 413 (1986) (quoting Engle v. Isaac, 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783 (1982)). The cause and prejudice test also applies to procedural defaults during state collateral proceedings. Presnell v. Kemp, 835 F.2d 1567, 1580 (11th Cir. 1988) (Georgia successive

petition rule), cert. denied, ___U.S.__, 109 S.Ct. 882, 102 L.Ed.2d 1004 (1989).

However, a procedural bar precludes federal review only if its constitutes an "adequate and independent state ground" for deciding the claim. Harris v. Reed, 489 U.S. 255, ___, 109 S.Ct. 1038, 1041-42, 103 L.Ed.2d 308, 315-16 (1989). Under Harris, whether a state court decision rests on an adequate and independent state ground for purposes of federal habeas review is subject to the "plain statement" rule of Michigan v. Long, 463 U.S. 1032, 1042 and n.7, 103 S.Ct. 3469, 3477 and n.7, 77 L.Ed.2d 1201, 1215 and n.7 (1983). Harris, 489 U.S. at ___, 109 S.Ct. at 1042, 103 L.Ed.2d at 316. Thus, a procedural bar does not preclude consideration of a federal claim on direct or habeas review unless the last state court rendering

judgment 'clearly and expressly' states that its judgment is based on a state procedural bar. Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231, 238 (1985) (quoting Michigan v. Long, 463 U.S. 1032, 1041, 103 S.Ct. 3468, 3476, 77 L.Ed.2d 1201, 1214 (1983)).

A state procedural rule is inadequate if its application in a particular setting is unforeseeable or if state courts have applied it inconsistently and sporadically. Johnson v. Mississippi, 486 U.S. 578, 587, 108 S.Ct. 1982, 1987, 100 L.Ed.2d 575, 585-86 (1988); Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (en banc) (amendment to Georgia habeas corpus statute that state court applied retroactively to bar petitioner's claim not independent and adequate state ground precluding federal review).

In this case, the Florida Supreme Court determined that eleven of Duest's claims were waived because he did not provide argument on those claims in his appellate brief but merely referred to arguments presented in his Rule 3.850 motion. Accordingly, the state argues that these eleven claims are foreclosed from federal habeas corpus review. However, the state cites no other capital case in which such a procedural bar rule has been applied and cites only one 1955 criminal case in which a similar bar was applied. In contrast, Duest has filed a motion for summary judgment detailing capital cases in which the Florida Supreme Court has considered on the merits claims in which petitioners merely referred to arguments in their Rule 3.850 motions, as did Duest.

Considering the foregoing, this court concludes that the waiver rule used by the Florida Supreme Court to dispose of eleven of Duest's claims is not a state procedural bar based on independent and adequate state grounds. Accordingly, on federal habeas review the court will consider these eleven claims, with the exception of three claims that are also procedurally barred because Duest failed to raise them on direct appeal, Claims VI, VII, and XII. This procedural bar rests on an independent and adequate state ground, as the Florida Supreme Court "has faithfully applied its rule that claims not raised on direct appeal cannot be raised on post-conviction review." Dugger v. Adams, 489 U.S. 401, 410, 109 S.Ct. 1211, 1217 n.6, 103 L.Ed.2d 435, 445 n.6 (1989); see also Smith v.

Dugger, 840 F.2d 787, 796 (11th Cir. 1988) (Florida Supreme Court consistently applies both procedural default and contemporaneous objection rules in capital cases, so as to constitute adequate procedural bars), cert. denied, ___ U.S. ___, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990). Neither has Duest shown cause for or prejudice from his default sufficient to overcome the procedural bar. Accordingly, the following claims are not cognizable on federal habeas review:

1. Claim IV, determined to be procedurally barred in Duest's motion for post-conviction relief for failure to raise it on direct appeal. Duest, 555 So.2d at 851.[13]

---

[13] Although this court is barred from

2. Claim VI, determined to be procedurally barred in Duest's state habeas petition for failure to raise it on direct appeal. Id. at 853.[14]

3. Claim VII, determined to be procedurally barred in Duest's state habeas petition for

---

considering the substance of this claim, it will be considered infra as it relates to ineffective assistance of appellate counsel.

[14] The court rejects Duest's argument that this claim was raised on direct appeal. On direct appeal, Duest challenged the sufficiency of the evidence to establish this aggravating circumstance, not whether the aggravator is unconsititutionally vague or was unconstitutionally applied. On direct appeal, the Florida Supreme Court rejected Duest's claim that insufficient evidence existed to establish this aggravating circumstance. Duest, 462 So.2d at 449-50. This court agrees with that conclusion.

failure to raise it on direct appeal. Id.

4. Claim XII, determined to be procedurally barred in Duest's state habeas petition for failure to raise it on direct appeal. Id.

5. Claim XVI, determined to be procedurally barred in Duest's motion for post-conviction relief for failure to raise it on direct appeal. Id. at 851.[15]

---

[15] As Duest recognizes in his petition, the Florida Supreme Court also treated this issue in the context of ineffective assistance of appellate counsel, finding that appellate counsel could not be deemed ineffective because trial counsel failed to properly preserve the issue by contemporaneous objection. Duest, 555 So.2d at 852. Duest has convinced the court that counsel contemporaneously objected to the evidence and thus that the issue of ineffective assistance of appellate counsel was a viable one. The court considers this ineffectiveness claim infra.

III. The Brady Claim (Claim I)

Duest claims that the prosecution improperly withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). To prevail on these claims, Duest must show that the evidence was "material" either to his guilt or punishment, irrespective of the prosecutor's good or bad faith. Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218. "The evidence is material only if there is reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine

confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985).[16] The same materiality standard applies to the "no request," "general request." and specific request" discovery violations outlined in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Bagley, 473

---

16 This standard in Justice Blackmun's opinion, joined by Justice O'Connor, received support from a concurring opinion joined by three Justices. Taken together, the two opinions establish a majority position on the Court for the proper standard to apply to the prosecution's failure to disclose exculpatory evidence. It is the same standard used for ineffective assistance of counsel claims in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See generally, W.LaFave & J. Israel, Criminal Procedure §19.5 at 162 (Supp. 1990) (discussing different opinions in Bagley).

U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494.[17]

---

[17] It is unclear how these three categories of cases will be treated following Bagley. Justice Blackmun, joined by Justice O'Connor, indicated that "the reviewing court should assess . . . the totality of the circumstances" when determining whether a Brady violation occurred. Bagley, 473 U.S. at 683, 105 S.Ct. at 3384, 87 L.Ed.2d at 494. However, Justice Blackmun recognized the particular problem represented by specific request cases: "[T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." Id., 473 U.S. at 682-83, 105 S.Ct. at 3384, 87 L.Ed.2d at 494. Justice White, in an opinion joined by Chief Justice Burger and Justice Rehnquist, stated that there was "no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case" because the materiality standard was flexible and the cases to which it applied were on an "inherently fact-bound nature." Id. at 685, 105 S.Ct. at 3385, 87 L.Ed.2d at 496. See W. LaFave v. J. Israel, supra, at 163 (following Bagley, "[e]xactly what weight will be given to the presence of a specific request remains to be seen").

A. The Bus Ticket

The first purported Brady violation concerns a bus ticket dated April 5, 1982, which reflected travel from Boston to Fort Lauderdale by an unidentified holder. Duest argues that the ticket would have supported his alibi defense that he was in Massachusetts when Pope was killed. The ticket was contained in police files along with other items belonging to Duest. The ticket surfaced during the state trial court's evidentiary hearing on Duest's motion for post-conviction relief.

The state trial court denied post-conviction relief regarding the bus ticket. On appeal, the state supreme court also denied relief. Although the state supreme court stated that an inadvertent Brady violation occurred, it

ruled that Duest had failed to demonstrate under Bagley that the bus ticket would have made any difference to this defense. Duest, 555 So.2d at 850.

Under 28 U.S.C. §2254(d), this court accepts the state court's factual determination that an inadvertent Brady violation occurred. Sumner v. Mata, 449 U.S. 539, 547, 101 S.Ct. 764, 769, 66 L.Ed.2d 722, 731 (1981) (presumption applies to factual determinations of both state trial and appellate courts)[18]

---

[18] Duest continues to dispute the finding that the prosecution's failure to disclose the ticket was inadvertent. However, the court presumes as correct the state court's factual finding that this Brady violation was inadvertent and thus need not consider Duest's argument that the state knowingly presented false and misleading evidence to the jury when it introduced testimony that a search of Trailways' records revealed Duest left no property at the bus station. Because the Florida court determined that a Brady violation occurred, this court need not consider whether the arresting officer was part of the prosecutorial team, so that his knowledge of possible

But having considered the bus ticket in light of Bagley, this court determines that no reasonable probability exists that the ticket would have been changed the outcome of Duest's case. The ticket does not show that Duest was in Massachusetts on February 15, 1982, the day Pope was killed. Whether Duest was in Massachusetts 49 days later does not aid his alibi defense, as he could have fled Florida after the murder to return again in April. No defense witness testified that Duest was in Massachusetts continuously from February until April.

Brady material would be imputed to the prosecutor. See, e.g., Stano v. Dugger, 901 F.2d 898, 906 (11th Cir. 1990) (Edmundson, J., concurring) (setting forth framework to aid district court in determining whether detective was part of prosecution team).

At most, the April ticket merely would corroborate the testimony of Duest's parents that they put him on a bus to Florida in April. No reasonable probability exists that an April bus ticket would have convinced the jury that Duest was innocent of the offense with which he was charged. At trial, the jury chose to disbelieve eleven of Duest's relatives and friends, who testified for the defense that they had seen Duest in Watertown, Massachusetts, on February 15, 1982, the date of the murder. Instead, the jury choose to believe seven prosecution witnesses who identified Duest as being in Fort Lauderdale on that date. Under Bagley, there is no reasonable possibility that an April bus ticket would have convinced the jury that Duest did not commit the February murder, when the jury did not

believe a hardware store owner who produced a February receipt that purportedly showed that Duest was in Massachusetts when Pope was killed.

B. The Statements of Various Witnesses

Besides the bus ticket, Duest claims the prosecution committed discovery violations regarding the statements of various witnesses. The state trial court conducted no evidentiary hearing on these claims and Duest requests one in this court. Because the court concludes that Duest is not entitled to relief even if the facts he alleges are true, this court determines that these claims are without merit and that Duest is entitled to no evidentiary hearing. Agan v. Dugger, 835 F.2d 1337, 1338 (11th Cir. 1987), cert. denied, 487 U.S. 1205, 108 S.Ct. 2846, 101 L.Ed.2d 884 (1988).

1. Possible Mitigating Evidence Offered by a Jail Inmate

Duest argues that the prosecution should have disclosed to the defense the statement of jail inmate Octavius Proia. Proia told police that Duest confessed to the crime and stated that he was going to use an alibi defense. Proia also told police that Duest stated that he stabbed Pope after he and Pope got into an argument. The prosecution declined to use Proia's statement in rebuttal during a guilt phase when defense counsel stated that he would withdraw as Duest's counsel if Proia testified because of a perceived conflict of interest. Transcript at 1332-34.[19]

---

[19] Proia was represented by the public

Duest argues that the information that Proia provided to police was necessary mitigating evidence for the penalty phase of his trial, even if it would have helped to establish his guilt. Under Brady the prosecution is required to disclose evidence that is "both favorable to the accused and 'material either to guilt or to punishment...'" Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218. Thus, the fact that Proia's testimony would have been inculpatory does not absolve the prosecution of the duty to disclose it if that testimony were truly

---

defender's office, which also represented Duest at trial. The prosecution did not list Proia as a witness, as he gave his statement to a police investigator nine days after Duest's trial began. After the prosecution declined to offer Proia's testimony in rebuttal, Duest's counsel did not contact Proia to determine the substance of his testimony. For further discussion, see infra, part XVI.A.2.

material to the sentence that Duest received.

This court finds that the purportedly mitigating evidence in Proia's statement was not sufficient to create a reasonable probability of a different result in the penalty phase of Duest's case. Proia would have presumably testified not only about the argument, but also that Duest told Proia that when he left the gay bar he intended to either kill Pope or do him bodily harm in order to rob him. Appendix to Petition for Writ of Habeas Corpus, Vol. I, #13 at 4. Proia's testimony would have included Duest's statement that he was careful not to touch anything at Pope's house and to wipe fingerprints from Pope's car. Id. Proia's testimony would also have included Duest's statement that when he

left Pope was not yet dead, after being stabbed in the heart and lungs. Id. Finally, Proia's testimony would have included Duest's statement that he was concocting an alibi defense. Considering Proia's statement as a whole, its introduction would not have resulted in a different penalty for Duest.

2. Impeachment Evidence Regarding Various Witnesses

Duest also argues that he unconstitutionally was denied evidence that would have impeached the testimony of various prosecution witnesses. Such impeachment evidence is within the scope of the Brady rule under Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108, 109

(1972). Duest raised these issues on December 17, 1989, in a supplement to his motion to vacate judgment and sentence. (Claim N). On January 4-5, 1990, at the hearing before the state judge, counsel for Duest made no mention of these claims, but confined his argument to the bus ticket issue. Transcript at 228-38. Duest neither produced nor requested the production of the alleged exculpatory statements he claimed the state withheld. Counsel for Duest never asked for a hearing on these issues. This argument was raised on appeal, but the Florida Supreme Court rejected it as being without merit. Duest, 555 So.2d at 851. This court agrees with that conclusion.

This court has considered the inadvertent Brady violation of withholding the bus ticket as to its

impact on the penalty phase of the case. The court finds that the omission of this evidence does not create "a reasonable doubt that did not otherwise exist"[20] with respect to the jury's decision at the guilt or the penalty phase of this case. United States v. Agurs, 427 U.S. at 104, 96 S.Ct. at 2397, 49 L.Ed.2d at 350; Chaney v. Brown, 730 F.2d 1334, 1340 (10th Cir. 1984), cert. denied, 469 U.S. 1090, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984).

IV. The Johnson Claim (Claim II)

Duest argues that his case should be remanded for a new sentencing hearing

---

20 Duest's request for exculpatory evidence from the state encompassed, '[a]ny evidence favorable to the Defendant which is material to the issues of guilt or punishment." Record at 1709. The court construes this to be a "general request" under Agurs.

under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), because one of his prior convictions was vacated after the death penalty was imposed. This prior Massachusetts conviction, for armed assault with intent to murder, constituted part of an aggravation circumstance used to impose the death penalty, as it was a prior conviction of a felony involving the use or threat of violence to a person. The vacated felony involved an incident in which Duest fired shots at two police officers who were pursuing him. Duest pled guilty to the offense, but his conviction was vacated by a Massachusetts appeals court after it determined that no evidence existed that Duest possessed the requisite specific intent to kill the pursuing officers.

As a threshold matter, the court must determine whether the Florida Supreme Court upheld Duest's death sentence, based in part on this vacated conviction, through a re-weighing of aggravating and mitigating circumstances or under a harmless error review. Either method is permitted under the federal Constitution. Clemons v. Mississippi, ___, U.S. ____, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). However, the method employed by the Florida Supreme Court determines whether this court can consider Duest's claim under federal question review. If the Florida Supreme Court re-weighed the aggravating and mitigating factors, Duest's claim is procedurally barred. If the Florida Supreme Court conducted a harmless error review, this court must review its decision under Chapman v. California,

386 U.S. 18, 87 S.Ct. 824, 17 I.Ed.2d 705 (1967). The parties are diametrically opposed as to which analysis the Florida Supreme Court employs.

After considering the Florida Supreme Court's language in Duest, a plethora of previous Florida decisions,[21] and characterizations of

---

[21] See, e.g., Freeman v. State, 563 So.2d 73, 77 (Fla. 1990) ("It is not this Court's function to reweigh [the aggravating and mitigating] circumstances"); Hudson v. State, 538 So.2d 829, 831 (Fla.) (It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances'), cert. denied, ___ U.S. ___, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); Atkins v. State, 497 So.2d 1200, 1203 (Fla. 1986) ("It is not this Court's function to engage in a general de novo re-weighing of the circumstances"); Bates v. State, 465 So.2d 490, 493 (Fla. 1985) ("As a reviewing court, we do not reweight the evidence . . . We have consistently held that the weighing of aggravating circumstances is the trial judge's function'); Lucas v. State, 417 So.2d 250, 251 (Fla. 1982) ("This Court's role

the Florida Supreme Court's analysis in United States Supreme Court decisions, the court concludes that Florida conducts a harmless error review in capital cases.[22] Thus, this issue is subject to federal habeas corpus review under Chapman.

As required by Chapman, the Florida Supreme Court applied the proper "beyond a reasonable doubt" standard when conducting its harmless error analysis. Duest, 555 So.2d at 851; see Clemmons, ___ U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. First, the court

---

after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.'").

[22] Clemmons, ___, U.S. at ___, 110 S.Ct. at 1450, 108 L.Ed.2d at 741 (Florida Supreme Court does "not apply its harmless error analysis in an automatic and mechanical fashion") (quoting Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983)).

recognized that this case is distinguishable from Johnson, because even considering the vacated conviction, Duest still had an undisturbed conviction for armed robbery. Duest, 555 So.2d at 851. Because of that remaining conviction, "a basis still existed for the aggravating circumstance of prior conviction of a violent felony." Id. (citing Bundy v. State, 538 So.2d 445 (Fla. 1989); Daugherty v. State, 533 So.2d 287 (Fla.), cert. denied, 488 U.S. 959, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988)). Further, the supreme court noted that three other valid aggravating circumstances applied to Duest's sentence and concluded that "even if we were to find that one or two of the aggravating circumstances found by the trial judge, [sic] was inapplicable, it would still be

appropriate to maintain the death penalty." Id. (quoting Duest v. State, 462 So.2d at 450).

Considering the foregoing, it appears that the Florida Supreme Court concluded that it was beyond a reasonable doubt that Duest's sentence was unaffected by consideration of the prior Massachusetts conviction, which was later vacated because the aggravating circumstance of a prior conviction of a violent felony still existed and was thus properly considered in the balance of aggravating and mitigating circumstances. Under Clemons, this is a proper approach to the harmless error question. Clemons, ___, U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741. In contrast to Clemons, the record supports the Florida Supreme Court's conclusion that the error in

Duest's case was harmless. Here, the state did not emphasize repeatedly and argue the conviction that was later vacated to place little emphasis on the other violent felony conviction that remained. See Clemons, ___ U.S. at ___, 110 S.Ct. at 1451, 108 L.Ed.2d at 741; see also Johnson v. Mississippi, 511 So.2d 1333, 1338 (Miss. 1987) (state repeatedly argued invalidated aggravating circumstance), reversed, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Instead, the trial judge merely read both indictments to the jurors and informed them that convictions had been rendered on those indictments. Supplemental Brief at 2. Having reviewed the record, the court concludes that the consideration of the vacated conviction was harmless error that does not require remand for a new sentencing hearing.

V. Victim Impact Evidence and Prosecutorial Comment (Claim III)

Duest argues that he is entitled to habeas relief because the prosecution unconstitutionally introduced prejudicial victim impact evidence at the sentencing phase of the trial, in violation of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and South Carolina v. Gathers, ___ U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

Both Booth and Gathers espouse the principle that the introduction of victim impact evidence in capital cases violates the eighth amendment, because it allows the sentence to rely on evidence that the defendant was unaware of at the time of the crime and that did not factor into the decision to kill, and it thus unrelated to the defendant's

personal responsibility and moral guilt. Gathers, ___ U.S. at ___, 109 S.Ct. at 2210, 104 L.Ed.2d at 882-83. In Booth, the Supreme Court concluded that the statutorily mandated introduction of victim impact statements and descriptions of the victim's personal characteristics during the sentencing phase of a capital case violates the eighth amendment. Booth, 482 U.S. at 509, 107 S.Ct. at 2536, 96 L.Ed.2d at 452. Although the Court in Booth disapproved of victim impact statements, it recognized that the type of information included in such statements might be relevant in certain contexts, such as if it related directly to the circumstances of the crime or would rebut an argument offered by the defendant. Id. at 507 n.10, 107 S.Ct. at 2535 n.10, 96 L.Ed.2d at 451 n.10.

In Gathers, the Court ruled that the eighth amendment was violated when, during the sentencing arguments, the prosecutor read from a religious prayer that the victim was carrying when he was killed and referred to the fact that the victim also carried with him a voter registration card. Gathers, U.S. at ___, 109 S.Ct. at 2210-11, 104 L.Ed.2d at 883. The Court rejected the state's argument that the contents of these items were relevant to the crime, although it acknowledged that the fact that these items were scattered at the crimes scene indicated that the defendant was looking for valuables to steal, and was "thus a proper subject for comment." Id.

Duest's main argument under Booth and Gathers concerns the prosecution's introduction at trial of a photograph of

Pope's dresser, on which rested a picture of purported members of Pope's family. The Florida Supreme Court rejected Duest's victim impact claim while considering an ineffective appellate assistance claim, concluding that "[t]he photograph of the dresser appears to have been relevant to the case, and the fact that a picture of persons who may have been the victim's family appeared in the photograph injected minimal victim impact evidence into the trial." Duest, 555 So.2d at 852.

This court also determines that the eighth amendment was not violated by introduction of the challenged photograph during the guilt phase of Duest's trial. The photograph of Pope's dresser was relevant on another ground; that is, to show how the room was laid

out and what items were on the dresser. Furthermore, it was never established that those pictured in the photograph actually were Pope's family. Transcript at 460. The prosecutor in this case did not argue to the jury that the photograph represented Pope's family, thus arguing the contents of the evidence to show victim impact, in contrast to the prosecutor in Gathers, who argued the contents of the victim's belongings to describe him as a simpleminded religious person who was a good citizen.

Besides the photograph, Duest argues that eight amendment violations occurred when the state presented victim impact evidence to the jury and judge, in the prosecutor's closing argument at the penalty stage, and in statements from the victim's family included in the

presentence investigation report that was submitted to the sentencing judge. The court rejects the state's argument that these remaining Booth claims are procedurally barred, as the Florida Supreme Court clearly rejected this claim on its merits. Duest, 555 So.2d at 851 ("We reject as without merit the following additional claim[]: . . . The judge and the jury improperly relied upon victim impact evidence").

As these victim impact claims are thus cognizable on federal habeas review, the court considers the substance of the statements to which petitioner objects. In closing argument before Duest's sentencing jury, the prosecutor stated that the victim was "a young 64" who was "[e]njoying his life." While the prosecutor acknowledged that the victim may have been a homosexual,

he told the jury that he believed this would not affect their decision, because the victim "had just as much of a right to be the way he was as anybody else has to be the way they are." The prosecutor then went on to state that "[o]f course, [the victim] had a family, too." Statements of family members, specifically the victim's daughter and son, were included in the presentence investigation report given to the sentencing judge. Transcript at 1811-12.

The court concludes that neither the prosecutor's argument nor the inclusion of family statements in the presentence report constitute an eighth amendment violation within the scope of Booth and Gathers. See also Bertolotti v. Dugger, 883 F.2d 1503, 1528 (11th Cir. 1989). The prosecutor's statements describing

Pope are distinguishable from those in Gathers, because they include facts that were known to Duest when Pope was killed and were intended to discourage the jurors from treating Duest leniently because of a homophobic reaction to the circumstances of the crime. These statements differ materiality from those disallowed in Gathers and in Jackson v. Dugger, 547 So.2d 1197, 1198 (Fla. 1989) (only prosecution evidence during penalty stage was sheriff's testimony about murdered officer's good reputation among peers and impact of officer's death on peers' morale and ability to carry on duties). Similarly, the inclusion of two family members' statements in the presentence report presented only to the sentencing judge is distinguishable from the situation in Booth, in which a Maryland jury was

required by statute to consider victim impact statements. As required by Florida Law, the sentencing judge delineated the aggravating and mitigating circumstances that figured into her consideration of the appro riate sentence, which did no include reference to the impact of the crime on Pope's family. The mere fact that limited victim impact statements were included in the presentence report presented to the judge, who disregarded such statements in weighing the relevant aggravating and mitigating circumstances, does not constitute a violation of the eighth amendment under Booth.

VI. "Especially Heinous, Atrocious, and Cruel" (Claim V)

Duest argues that his sentencing jury was improperly instructed on the

aggravating circumstance "especially heinous, atrocious, or cruel" under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct.1853, 100 L.Ed.2d 372 (1988), and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

The Supreme Court approved Florida's use of this aggravating circumstance in conjunction with a limiting instruction in Proffitt v. Florida, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924-25 (1976). The proper limiting instruction informs the jury that this aggravator only applies to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). In Duest's case, no limiting instruction was given. Instead, the jury was simply instructed that "[t]he crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." Transcript at 1626.

On direct appeal, Duest argued that Pope's murder was not particularly heinous, atrocious, or cruel, in effect challenging whether evidence was

sufficient to establish this aggravating circumstance. The Florida Supreme Court disagreed with Duest:

> The evidence presented at trial shows that the victim received eleven stab wounds, some of which were inflicted in the bedroom and some inflicted in the bathroom. The medical examiner's testimony revealed that the victim lived some few minutes before dying.

Duest, 462 So.2d at 449. The court analogized Duest's case to Morgan v. State, 415 So.2d 6 (Fla.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982), in which the aggravating circumstance was applied to a death caused by one of more than ten stab wounds.

In his state habeas petition, Duest claimed to receive ineffective assistance of appellate counsel for failure to raise this claim on direct appeal. The Florida Supreme Court found appellate counsel to be adequate because trial counsel did not preserve the issue for appeal. Duest, 555 So.2d at 852.

Thus, significantly, Duest's counsel failed to make a contemporaneous objection to the failure to give a limiting instruction for this aggravator or to challenge the instruction given on direct appeal. If Duest had raised this claim as a substantive matter in his Rule 3.850 motion or in his state habeas petition, the Florida Supreme Court would have determined that it was procedurally barred. If a state court would apply a procedural bar if had been given the opportunity to do so, a

federal court similarly should apply a procedural bar on habeas review. Teague v. Lane, 489 U.S. 288, ___, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334, 347-48 (1989) (plain statement rule announced in Harris v. Reed does not apply to claim not presented to state court). Accordingly, this court finds that this claim is procedurally barred from habeas review. Duest has not shown cause and prejudice or a miscarriage of justice resulting from application of this bar.

VIII. Burden-shifting at Sentencing (Claim VIII)

Duest argues that the penalty phase jury instructions impermissibly shifted the burden of persuasion to him and that the trial judge employed the same impermissible standard in imposing the death sentence. Specially, Duest objects to instructions that the jury

was to determine whether the mitigation presented outweighed the aggravation, because the existence of one aggravating factor would create a presumption that the death penalty was appropriate.

The sentencing jury in Duest's case was instructed to determine "first, whether sufficient aggravating circumstances exist that would not justify the death penalty, and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any, "and to decide whether any aggravating circumstances had been proven beyond a reasonable doubt. Transcript at 1572, 1590. See also Transcript at 1626-27.

The court finds that these instructions mirrored the language in

Florida's capital sentencing statute. See Fla. Stat. §921.141(2)(a)(b). Florida's capital sentencing scheme, including this particular language, was approved by the Supreme Court in Proffitt v. Florida, 428 U.S. at 258, 96 S.Ct. at 2969, 49 L.Ed.2d at 926 ("directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones"). There is no merit to Duest's claim that the sentencing instructions constituted impermissible burden-shifting.

-VIII. Consideration of Sympathy at Sentencing (Claim IX)

Duest argues that the trial judge improperly instructed the jurors that they could not consider sympathy toward Duest when determining what their

sentence recommendation would be, under the authority of California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

However, Brown does not stand for the blanket proposition that all antisympathy instructions are impermissible at sentencing. Saffle v. Parks, ___U.S.___, ___, 110 S.Ct. 1257, 1263, 108 L.Ed.2d 415, 428 (1990). Furthermore, if Brown were considered a new rule, the Supreme Court has ruled that it would not apply retroactively on collateral review. Id., ___U.S. at ___, 110 S.Ct. at 1263-64, 108 L.Ed.2d at 428-29. Because Brown was decided approximately two years after Duest's conviction became final, Brown is inapplicable to his case and thus this claim must fail.

IX. The Caldwell Claim (Claim X)

Duest argues that the sentencing instructions to the jury improperly diminished the jurors' sense of responsibility to his death sentence, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Following Sawyer v. Smith, ___U.S.___,110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), Duest cannot use Caldwell to attack his conviction and sentence on federal habeas corpus. In Sawyer, the Supreme Court held that Caldwell was a new rule for purposes of Teague v, Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, and thus it could not be used by federal habeas petitioners whose convictions became final before it was decided. Sawyer, ___U.S. at ___, 110 S.Ct. at 2827, 111 L.Ed.2d at 206. As

Caldwell was decided June 11, 1985, and Duest's conviction became final January 10, 1985, his Caldwell claim must fail.

X. Nonstatutory Aggravating Factors (Claim XI)

Duest argues that the death penalty was arbitrarily and capriciously imposed because the prosecution introduced evidence of nonstatutory aggravating factors, such as the fact that Duest is homosexual and never served in the military. Under Florida law, aggravating circumstances are limited to those enumerated in the statute. Fla.Stat. §921.141(5).

The Florida Supreme Court addressed this claim as one for ineffective assistance of appellate counsel, concluding that appellate counsel could not be deemed lineffective for failing

to raise on appeal an issue that trial counsel had not preserved. Duest, 555 So.2d at 852.

Because this claim was not raised on direct appeal as a substantive matter, had Duest raised it in his Rule 3.850 motion or in his state habeas petition, the Florida Supreme Court would have determined that it was procedurally barred. Under these circumstances, this federal court similarly should apply a procedural bar on habeas review. Teague, 489 U.S. at ___, 109 S.Ct. at 1068-69, 103 L.Ed.2d at 347-48. Because Duest has not shown cause and prejudice regarding his procedural default, the court finds that this claim is not cognizable on federal habeas review.

XI. Sufficiency of the Evidence (Claim XXII)

Duest argues that his conviction violated due process because the evidence was insufficient to support a finding of first-degree murder under a premeditation theory, one of the two bases under which the jury could have convicted him of first degree murder.[23] This claim was considered and rejected by the Florida Supreme Court on direct appeal:

> Premeditation, like other factual circumstances, may be established by circumstantial evidence. Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Such circumstantial evidence must not only be consistent with the defendant's guilt, but must also be

---

[23] Duest does not challenge the sufficiency of the evidence to establish felony murder, the other possible basis for the jury's conviction.

inconsistent with any reasonable hypothesis of innocence. Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct.2036, 68 L.Ed.2d 342 (1981). The record reflects that defendants had stated he gets his money by "rolling gay guys" and that he intended to do the same on the day that the victim was murdered. Defendant was seen with the victim at a gay bar immediately prior to the murder and was seen leaving the bar with the victim in the victim's car. Shortly thereafter, defendant was seen driving the victim's car alone. At that time, witnesses saw blood stains on the sleeve of his jogging suit. The victim's stolen jewelry case was also seen in the car which was being driven by

> defendant after the murder. Moreover, on the day of the murder, defendant had in his possession a s even inch knife. The cause of death in this case was multiple stab wounds. We find that there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder.

Duest, 462 So.2d at 448-449. Like the Florida Supreme Court, this court finds no merit to this claim.

XII. Race as a Factor in Sentencing (Claim XXIII).

Duest argues that Florida imposes the death penalty on the basis of impermissible, arbitrary, and discriminatory factors, including race, in violation of the eighth and fourteenth amendments. Duest devotes some 39 pages of his petition to this

argument, quoting extensively from studies by Professors Gross and Mauro. This claim, based on the same studies, was rejected in McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 96 L.Ed.2d 262 (1987), which collateral counsel does not bother to cite.

XIII. Full and Fair State Court Forum (Claim XXIV)

Duest argues that he was denied a full and fair forum in state court, because the trial judge refused to disqualify herself from presiding over his Rule 3.850 proceedings. Duest argues that disqualification was required because the judge was prejudiced against him. As evidence of such prejudice, Duest points to a letter written by the trial judge in response to an inquiry from the Florida Parole and Probation Commission after Duest's

direct appeal was rejected. In that letter, the trial judge stated that "Mr. Duest is still lying to the Court and still trying to thwart whatever judicial process that remain."

On appeal of denial of his Rule 3.850 motion, the Florida Supreme Court found this claim to be without merit. Duest, 555 So.2d at 851. The Florida Supreme Court's interpretation of Florida law as applied to Duest is not reviewable in a federal habeas corpus proceeding. Garcia v. Perringer, 878 F.2d 360, 362 (11th Cir. 1989). Duest has not demonstrated that he failed to receive a full, fair, and adequate hearing in state court, so as rebut the presumption of regularity given to state court proceedings on federal habeas review. 28 U.S.C. §2254(d)(6).

XV. Instruction Regarding Life Recommendation (Claim XXV)

Duest argues that his capital sentencing proceedings were robbed of any indicia of reliability when the trial judge erroneously instructed the jury that a majority had to recommend life imprisonment. The jury recommended the death penalty by a majority of 7-5.

Duest's counsel did not object to this instruction at trial and did not raise it on direct appeal. Thus, were this issue before the Florida Supreme Court, it would be procedurally barred. Under the rule of Wainwright v.Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), this clam is cognizable on federal habeas review only if Duest demonstrated cause and prejudice for his default. See Ford v. Strickland, 696

F.2d 804, 812, 822 (11th Cir.), cert. denied, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); see Engle v. Isaac, 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783, 805 (1982) (challenge to jury instructions barred from federal habeas review because of petitioner's failure to comply with Ohio contemporaneous review).

Duest has not shown cause for trial counsel's failure to contemporaneously object to this instruction at trial. Furthermore, there is no evidence that Duest was prejudiced by the erroneous instruction. In the context of jury instructions, "prejudice means 'not merely that the errors at [the petitioner's] trial created a possibility of prejudice, but that they worked to his actual and substantial

disadvantage.'" Ford, 696 F.2d at 822 (Godbold, J., concurring in part and dissenting in part) (quoting United States v.Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 1982) (emphasis in original)). Duest cannot show such prejudice, because he can do so more than raise the possibility that the jury might have deadlocked on the issue of death or life imprisonment. There is nothing in the record to show that the jury deadlocked at 6-6, which would have resulted in a life recommendation. Without such record evidence or a proffer from Duest, no prejudice has been shown. Henry v. Wainwright, 743 F.2d 761, 763 (11th.Cir. 1984) (although instructions at capital sentencing did not inform jurors of consequences of tie vote, no prejudice when seven jurors voted for death penalty).

XV. The Strickland Claims (Claims VIII, XI, XIII, XIV, XV, XVII, XVIII, XIX, XX, XXI)

Duest argues that he received ineffective assistance of counsel, both at trial and on direct appeal. Some of these ineffective assistance claims are raised separately and some are included within other substantive claims.

The standard for reviewing ineffective assistance claims was set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on such a claim, Duest must show that his counsel's performance was below an objective standard of reasonableness, considered from his counsel's perspective at the time of the conduct. Id. at 688-89, 104 S.Ct. at 2064-65, 80 L.Ed.2d at 694.

Duest must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. The same standard applies to both the guilt and penalty phases of a capital case. Funchess v. Wainwright, 772 F.2d 683, 688 (11th. Cir. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct.1242, 89 L.Ed.2d 349 (1986). The two components of an ineffective assistance claim need not be considered in any particular order. In fact, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice...that course should be followed." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed.2d at 699.

Questions of ineffective assistance of counsel or of conflict of interest are mixed questions of law and fact. Strickland, 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700 (ineffective assistance); Cuyler v.Sullivan, 446 U.S. 335, 341, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333, 334 (1980) (conflict of interest); Lusk v. Dugger, 890 F.2d 332, 336 (11th. Cir. 1989) (ineffective assistance), cert. denied, ___U.S.___,110 S.Ct. 3297, 111 L.Ed.2d 805 (1990); Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th. Cir. 1987); (conflict of interest), cert. denied, 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 345 (1988). State court findings made in deciding such claims are subject to the deference requirement of section 2254(d), but both prongs of the Strickland inquiry are mixed questions

of law and fact. Strickland, 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700.

The court first considers Duest's claims of ineffective assistance of 'trial counsel and second those claims dealing with ineffective assistance of appellate counsel.

A. Ineffective Assistance of appellate counsel.

1. Failure to Object to Impermissible Burden-Shifting During Penalty Phase (Claim VIII)

Duest argued that he received ineffective assistance because trial counsel did not object to jury instructions that impermissibly shifted

the burden of proof to Duest at sentencing.

On review of Duest's state habeas petition, the Florida Supreme Court considered this issue as one involving ineffective assistance of appellate counsel. The court determined that appellate counsel could not be deemed ineffective for failing to raise a claim that trial counsel had not preserved by objection. Duest,855 So.2d at 852; see Francois v. Wainwright, 741 F.2d 1275, 1285-86 (11th. Cir. 1984) (given state procedural bar, appellate counsel could reasonably conclude on appeal that Florida Supreme Court would not address issue on merits).

In this federal habeas petition, Duest also raised this burden-shifting

claim as a substantive matter, a claim that this court has rejected. Because this court has determined that no impermissible burden-shifting occurred, Duest was not prejudiced by his trial counsel's failure to object to the challenged jury instructions.

2. Failure to Pursue Possible Mitigating Evidence Because of Conflict of Interest (Claim XIII)

Duest argues that a Strickland violation occurred when trial counsel failed to depose Octavius Proia, a jail inmate from Pennsylvania who could have provided mitigating evidence at the penalty phase. Specifically, Duest argues that the failure resulted from a conflict of interest, in that the public defender's office represented both Duest and Proia.

Proia was in jail for a short time following his arrest in Florida for a probation violation, arising from an earlier forgery conviction, when he contacted the state attorney's office to provide information about Duest's case. Transcript at 1291. In a statement provided nine days after Duest's trial began, Proia stated that Duest told him he had witnesses from Massachusetts who would lie to construct his alibi defense, including an auto parts store employee who would produce a phony receipt to show Duest was in Massachusetts when Pope was murdered.

Besides this testimony, which would have been inculpatory during the guilt phase of Duest's trial, Proia also stated that Duest said he had an

argument with Pope before the stabbing occurred. Appendix to Petition for Writ of Habeas Corpus, Vol. 4, Tab 13 at 3. According to Duest, if this testimony had been presented in mitigation, it would have rebutted two aggravating circumstances submitted to the jury: that the murder was cold, calculated, and premeditated; and that it was committed for pecuniary gain while in the course of a robbery.[24]

It is clear that the right to effective assistance encompasses the right to representation free from actual

---

[24] Although pecuniary gain and commission of murder while in the course of a felony are two distinct aggravating circumstances inthe Florida statutes, the state trial court judge considered them as one circumstance when she weighed the aggravating and mitigating circumstances before she determined that death was the appropriate sentence for Duest.

conflict. Lightbourne v. Dugger, 829 F.2d at 1023 (citing, inter alia, Cuyler v. Sullivan, 446 U.S. at 349, 100 S.Ct. at 1719, 64 L.Ed.2d at 347. Under the two-part test established in Cuyler, Duest must show that an actual conflict existed and that the conflict had an adverse effect on his counsel's representation. Id. at 1023. If this two-part test is met, prejudice is presumed and Duest is entitled to relief. Id.

The threshold question before the court is whether an actual conflict of interest existed in Duest's case. See id. ("possible, speculative or merely hypothetical conflict does not suffice"). According to Duest, both parties and the state trial court recognized that an actual conflict

existed because both Duest and Proia were represented by the same public defender's office. Proia had a different assistant public defender than Duest and had not previously used the public defender's office. Transcript at 1291. Yet after the potential conflict was discovered, Proia's public defender withdrew from his case. Transcript at 1296, 1333. However, the parties disagreed as to whether that withdrawal cured the conflict. Id. Eventually, the prosecution agreed not to call Proia when defense counsel stated that he would withdraw from the case and file a motion for mistrial if Proia testified. Transcript at 1332-34.

From the foregoing, the court concludes that the parties and trial court recognized a conflict if Proia

were to testify during the guilt phase of Duest's case. During the guilt phase, a potential conflict existed; however, that potentiality was prevented from ripening into an actuality when the prosecutor agreed not to put Proia on the witness stand. The potential conflict allowed Duest's counsel to block Proia's testimony, which would have irretrievably damaged Duest's alibi defense.

The fact that the parties and the trial judge recognized a conflict of interest in terms of the guilt phase does not mean that an actual conflict of interest existed in terms of sentencing. "An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant

would damage the defense of another defendant whom the same counsel is representing." Porter v. Wainwright, 805 F.2d 930, 939 (11th Cir. 1986), cert. denied, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). To show an actual conflict, Duest must show that his trial counsel "'made a choice between possible alternative courses of action such as eliciting (or failing to elicit) evidence helpful to [Duest] but harmful to [Proia]. If he did not make such a choice, the conflict remained hypothetical.'" United States v. Mers, 701 F.2d 1321, 1328 (11th. Cir.) (quoting Comment, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & Criminology, 226, 232 (1977)), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 482, 78 L.Ed.2d 679 (1983).

In this case, Duest's trial counsel had no conflict of interest regarding Proia's statement for purposes of the penalty stage of the proceedings. Before the prosecutor agreed not to use Proia's testimony, he stated on the record that Proia had given a sworn statement. Transcript at 1334. Duest's counsel could have requested that statement, and the mitigating evidence therein, without having to choose between Duest and Proia's interests. Without showing that such a choice was necessary, Duest has not proved that an actual conflict of interest existed. Stevenson v. Newsome, 774 F.2d 1558, 1562 (11th. Cir. 1985), cert. denied, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

In any event, even if an actual conflict existed, Duest has failed to show that such conflict prejudiced him. Even if Proia would have provided testimony that the stabbing occurred after an argument, Proia also would have testified that Duest was relying on Massachusetts witnesses who would lie to construct his alibi defense. Had the jurors heard such testimony after the defense steadfastly maintained Duest's innocence, both counsel and Duest would have suffered serious credibility problems with the jurors and the judge, which would have made them less inclined to believe other mitigating evidence presented. Smith v. Dugger, 840 F.2d 787, 795 (11th. Cir. 1988), reh'g denied, 888 F.2d 94 (11th. Cir. 1989), cert. denied, ___U.S.___, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990).

Furthermore, Proia's testimony would have included Duest's statement on his intentions when going to the bar and the methodical manner in which he executed the stabbing, which would have supported other aggravating circumstances.

3. Failure to Suppress Duest's Statements Claim (XIV)

Duest argues that he received ineffective assistance when counsel failed to suppress testimony that improperly commented on his silence in violation of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Duest also argues that the sixth amendment was violated when the prosecution used testimony in which a witness stated that he overheard Duest tell counsel that "I never committed a murder before."

As to Duest's claim that a sheriff's detective improperly commented on his silence, the record totally refutes such a claim. Detective Feltgen interviewed Duest at the courthouse and immediately advised Duest of his Miranda rights. Transcript at 876. Duest waived these rights and gave a full statement to Feltgen which was exculpatory in nature. Transcript at 877-878. On cross-examination, defense counsel asked whether this statement was recorded, and the following transpired:

Q. (Defense counsel): And there was no tape or anything like that going?

A. (Detective Feltgen): There was no tape going at that time.

Q. That's sometimes used, is it not?

A. If the defendant is willing to give a taped statement, a tape is used.

Q. You didn't ask him, though, did you?

A. Yes, I did.

Q. And he said no?

A. He refused to give any type of statement.

Transcript at 893.

In the context of the questioning, it is clear that Duest refused to permit a tape recording of his statement, but he never refused to give a statement. Duest's claim of a Doyle violation considerably exceeds the reach of that decision, which dealt with a trial where the prosecutor impeached the defendant's testimony explaining the circumstances of the case with comments on the defendant's failure to tell the same story at the time of his arrest. Defense counsel in this case was probing the detective's testimony to determine if there was a tape of Duest's statement

in the hope that he might find some inconsistency. This court concludes that Duest has failed to establish a Doyle violation.

With regard to the testimony of Rene Robles, who conducted the lineup identification, it appears that Duest made a voluntary statement which was not in response to any interrogation from Robles. There is nothing in the record to indicate that Duest's counsel was present at the time this remark was made. Robles testified that Duest was speaking to Robles. Accordingly, no sixth amendment violation has been established.

Since an objection by trial counsel would have been unavailing as to both incidents claimed herein, the court

concludes that under Strickland guidelines, trial counsel was not ineffective for failing to object.

4. Misinformation Regarding Burden of Proof of Alibi (Claim XVII)

Duest argues that defense counsel unreasonably and prejudicially misinformed the jury as to the burden of proof on his alibi defense. During jury voir dire, defense counsel stated to prospective jurors that "we just have to raise a reasonable doubt" as to Duest's whereabouts on the day of the murder. Transcript at 366.

The Florida Supreme Court concluded that there was no merit to this claim. Duest, 555 So.2d at 851. This court agreed and concludes that Duest can show

no prejudice from defense counsel's statements so as to amount to ineffective assistance. Before their deliberations, the jurors were properly instructed that the prosecution bore the burden of proving beyond a reasonable doubt each element of the offense charged. Transcript at 1518-19. The jury was presented with conflicting evidence about Duest's whereabouts on the day of the murder and there was substantial evidence that Duest was at the scene of the crime. The jury determined that this evidence showed beyond a reasonable doubt that Duest was guilty of the crime with which he was charged.

5. Failure to Conduct Independent Investigation and Present Compelling Mitigation at Penalty Phase (Claim XVIII)

Duest argues that at sentencing, trial counsel violated the rule enunciated in Strickland by failing to conduct an independent investigation regarding possibly mitigating evidence that could have been presented at sentencing. The Florida Supreme Court dismissed this claim as without merit. Duest, 555 So.2d at 851.

Duest's attorney was required to conduct a "reasonable investigation" into possible mitigating evidence. Smith, 840 F.2d at 795. Duest claims that his trial attorney failed to conduct a reasonable investigation by not obtaining his school, hospital, and prison records, in part to present them as background documentation to the mental health experts who examined Duest

before sentencing. Duest claims that such investigation and presentation would have bolstered the mitigating evidence he did present at sentencing.

The trial court conducted an evidentiary hearing on this claim wherein it was established that trial counsel did conduct an adequate investigation into the defendants' mental health, family relationships and educational background. Trial counsel was dependent upon the defendant and his family for leads as to relevant data. Trial counsel retained Dr. Patsy Cerous-Livingston to interview the defendant and to prepare a report. The information included in the report was not used at the penalty phase as trial counsel made a conscious decision to exclude it. The report would have

opened the door to considerable damaging evidence that would have prejudiced the defendant. Transcript at 155, 157, 175, 176. Included in the prejudicial information was the following: the defendant committed 28 prior felonies, had prior escapes from prison, was found with a knife in prison, had homosexual tendencies, would probably escape again if given the opportunity, indicated that he never acted inappropriately in the commission of any crime, and is inclined to take what he wants rather than being able to delay gratification.

Collateral counsel for the defendant hired Dr. Patricia Fleming to interview the defendant and to examine records. She came to a somewhat different conclusion than Dr. Ceros-Livingston, but her report also included some of the

same negative observations that Dr. Ceros-Livingston's report included.

This court has reviewed the entire hearing transcript on this issue and agrees with the state court judge that Duest has failed to establish his ineffective assistance of counsel claim. Counsel made strategy decisions which are protected are under Strickland.

6. Ineffective Assistance of Trial Counsel in Failure to Object to Prosecutorial Conduct and Statements (Claim XIX)

Duest argues that he received ineffective assistance when counsel failed to object to a number of comments by the prosecutor both in his opening statement and closing argument, which Duest contends denied him a fair trial.

On direct appeal, one of Duest's claims concerned whether the trial court properly denied a motion for mistrial based on alleged prosecutorial misconduct. Apparently, the Florida Supreme Court did not address this claim in denying Duest's direct appeal, except to the extent that it considered a claim that the prosecutor allegedly insulted defense counsel during cross-examination of a witness. Duest, 462 So.2d at 448. If a claim is raised on direct appeal, even if not addressed directly by the state supreme court, it is considered ruled on. Such a claim is then foreclosed from state collateral attack but available in federal habeas petition as an exhausted claim. Smith, 840 F.2d at 791. Thus, the court will treat this claim as an exhausted claim.

Duest complains about the failure of trial counsel to object to a number of remarks made by the prosecutor in his opening statement, during trial, and in closing argument. Had these comments been preserved for appeal and raised on appeal, they would have been disposed of quickly as either no error or at best harmless error. Duest has failed to establish any basis for relief from this court.

Improper prosecutorial comment is not a basis for habeas relief unless the resulting prejudice amounts to a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

7. Failure to Object to Trial reliance on Hearsay Statements

Presentence Investigation

Report, Ex Parte Communications,

and Manner of Conducting

Sentencing Hearing (Claim XX)

In his federal habeas petition, Duest raises this claim both as a substantive matter and as a claim for ineffective assistance of trial counsel.

The Florida capital sentencing scheme allows presentation of hearsay evidence relevant to the crime and the defendant's character, provided the defendant has the opportunity to rebut any hearsay statement. Fla. Stat. §921.141(1); Dragovich v. State, 492 So.2d 350 (1986) (hearsay evidence that defendant had reputation as arsonist not subject to fair rebuttal and thus inadmissible in penalty phase).

Duest presents numerous unfocused allegations of impropriety in the pre-sentence investigation and at the

sentencing hearing. The court has reviewed these allegations and finds them wholly without merit.

8. Conflict of Interest Regarding Duest's Alibi Witnesses (Claim XXI)

Duest argues that his alibi witnesses were intimidated by the prosecutor when he advised them in depositions that they should confer with counsel before answering questions about Duest's whereabouts in February, when Duest was an escapee from a Massachusetts prison. The prosecutor properly alerted the witnesses that it might be a crime in Massachusetts to know the whereabouts of an escaped prisoner and not reveal this knowledge to proper authorities. Defense counsel also urged the witnesses to consider the implications of their testimony.

The Florida Supreme Court rejected as without merit Duest's claim that he was denied effective assistance in this alleged conflict of interest. Duest, 855 So.2d at 851. This court also finds Duest's claim to be without merit. Both the prosecutor and Duest's attorney acted in an ethical manner. Neither gave legal advice to these witnesses. They merely alerted the witnesses to potential legal problems and urged them to obtain independent legal advice. Defense counsel's conduct did not constitute deficient performance under Strickland.

B. Ineffective Assistance of Counsel

The ineffective assistance standard for appellate counsel requires that Duest establish that counsel's failure to raise an issue on appeal was not a

deliberate tactical judgment or based on a good faith evaluation of an issue's merit. Smith v. Murray, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 2666-67, 91 L.Ed.2d 434, 445 (1986); Francois v. Wainwright, 741 F.2d 1275, 1285-86 (11th Cir. 1984). If the decision to abandon the issue on appeal was deliberate, ineffective assistance may still exist by "even an isolated error of counsel . . . if that error is sufficiently egregious and prejudicial." Murray v. Carrier, 477 U.S. at 496, 106 S.Ct. at 2649, 91 L.Ed.2d at 413.

1. Failure to Raise Evidence of Flight (Claim IV)

Duest argues that appellate counsel was ineffective for failing to argue that the trial court erred in permitting, over objection, evidence

that Duest tried to escape while he was in police custody. The Florida Supreme Court considered this claim in its habeas review:

> Duest was contacted by the Fort Lauderdale police on April 18, 1982, and advised that he was a suspect in the homicide. He voluntarily went to the police station for questioning. At this time, Duest was known to the police as Robert Brigida. Duest was questioned by a detective about the murder. It was then discovered that misdemeanor traffic warrants were pending in Massachusetts against Robert Brigida, and Duest was arrested on these warrants. Thereafter, when the detective momentarily left the

> room and returned, Duest was missing. He was found several hours later at a Fort Lauderdale apartment.

Duest, 555 So.2d at 852. Considering these facts, the Florida Supreme Court reached the following legal conclusion:

> Duest's appellate counsel cannot be deemed ineffective for failing to argue this point. Evidence in this case raised a reasonable inference that Duest escaped as a result of consciousness of guilt of the murder rather than the pending assachusetts charges. Consistent with the rationale of Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), the jury

> could properly infer such circumstantial evidence to be evident of guilt. The argument would have been unavailing had been raised on direct appeal.

Duest, 555 So.2d at 852.

This court determines that Strickland does not require that Duest's petition be granted because of appellate counsel's failure to argue that the trial court erred in admitting evidence of flight. As evidence of flight is circumstantial evidence of guilt in Florida under Bundy, Duest's appellate counsel could have concluded, in good faith, that the issue did not merit appeal. Thus, Duest cannot show that he was prejudiced as a result of appellate counsel's failure to raise this claim.

2. Ineffective Assistance of Counsel on Direct Appeal (Claim XV).

Duest argues that his counsel on direct appeal was ineffective in failing to raise what appears in his petition as Claims IV, VII, VIII, IX, X, XI, XII, XIV, XVI, XX, and XXV. The court addressed ineffective assistance arguments concerning Claims IV, XIV, and XX in previous subsections, concluding that Duest had not shown under prejudice under Strickland so as to prevail on these claims. This court also rejected Claims VIII, IX, X, XI, and XXV on their merits or because they present new law that does not receive retroactive application to Duest's conviction and sentence. Thus, only Duest's ineffective assistance arguments involving Claims VII, XII, and XVI remain to be considered in this final subsection.

a. Refusal of sentencing court to find mitigating circumstances (Claim VII)

Duest claims that his eighth amendment right was violated by the sentencing court's refusal to find statutory and nonstatutory mitigating circumstances which are claimed to be in the record. Duest argues that the sentencing judge failed to articulate in her sentencing order to weight given to nonstatutory mitigating circumstances. This court finds no ineffective assistance claim has been established because even if this point had been raised on direct appeal, it would not have been successful. The Florida Supreme Court has held that there is no Hitchcock violation (Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)) when the sentencing

court fails to articulate the weight given to non-statutory mitigating circumstances. Harich v. State, 542 So.2d 980, 981 (Fla. 1989). The sentencing court herein found no mitigating circumstances. This finding was supported by the record in this case.

b. Death sentence resets upon automatic aggravating circumstances (Claim XII)

Duest claims that the jury may have found him guilty under Florida's felony-murder statute (§782.04(1)(a)2, Fla. Stat.) which defines a capital offense as one wherein a person is killed while the defendant is perpetrating a felony. Duest then claims that one of the aggravating circumstances found by the sentencing court was §921.141(5)(d);

"the capital felony was committed while the defendant was engaged . . . in the commission of . . . robbery . . ." Duest then argues that if the jury found him guilty of felony murder, the application of the aggravating circumstance to the felony murder statute fails to narrow the category of those who should receive the death penalty in violation of Zant v. Stephens, 462 U.S. 862, 876, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). As previously noted, this court must review this issue under the claim of ineffective assistance of appellate counsel.

Appellate counsel's performance cannot be found deficient for failing to raise this issue on appeal. The evidence of premeditation in this case was overwhelming. Duest v. State, 462 So.2d1 446, 448-49 (Fla. 1985). Furthermore, the United States Supreme Court has held that the fact than an aggravating circumstance duplicates one of the elements of the crime does not render the sentence of death unconstitutional. Lowenfield, 484 U.S. at 246, 108 S.Ct. at 555, 98 L.Ed.2d at 582-83.[25] The court rejects Duest's

---

[25] In Lowenfield, the aggravating circumstance which duplicated one of the elements of the crime was the only aggravating circumstance. The sentencing judge in this case found four aggravating circumstances. Thus, even if the jury found Duest guilty of felony-murder as opposed to premeditated murder, only one of four aggravating circumstances would have duplicated an element of the crime.

claim of ineffective assistance of appellate counsel on this claim.

c. Court's admission of evidence of other crimes and bad character evidence (Claim XVI)

Duest complains that the trial court admitted certain testimony over objectlion that described collateral activity of Duest consisting of "other crimes" incidents and bad character evidence. These issues were not raised on direct appeal and are not reviewed under Duest's claims of ineffective assistance of appellate counsel.

The primary testimony complained of by Duest involves an incident at a party when he used a razor blade to cut off the blouse of a 15-year old girl. Prior to the reception of this testimony by the court, counsel for Duest interposed

an objection on the ground that admission of this testimony would be unduly prejudicial under §90.403, Fla. Stat. The state argued for admission on the basis that Duest's defense was that of alibi. The witness who testified to the incident identified Duest as being at the party at the time Duest claimed to be in Massachusetts. The incident was such an unusual nature that it would be easily remembered and refute the contention that the witness was in error in identifying Duest. Duest argues that the admission of this evidence violates the rules in Castro v. State, 547 So.2d 111 (Fla. 1989), but this court finds to the contrary. In Castro, the court found that the objectionable evidence" . . . lacked relevance to any material fact in issue." 547 So.2d at 115. When the evidence in question is relevant to

a material fact in issue, the evidence is properly admissible under §90.404(2), Fla. Stat. See Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989).

This court find that none of the claims of Duest as to ineffective assistance of appellate counsel are supported by the record in this cause.

XVI. Conclusion

For the foregoing reasons, it is hereby:

ORDERED and ADJUDGED that Duest's motion for summary judgment on the issue of procedural default, filed February 28, 1990, is GRANTED, as provided herein.

ORDERED and ADJUDGED that Duest's

petition for a writ of habeas corpus, filed January 19, 1990 is DENIED.

DONE and ORDERED in Chambers at the United States District Court, Miami, this ___ day of September, 1990.

/S/
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Larry Helm Spalding, Capital Collateral Representative
Martin J. McClain, Deputy Chief Assistant CCR
Judith J. Dougherty, Assistant CCR
Celia Terenzio, Assistant Attorney General
Sylvia H. Alonso, Assistant Attorney General

DUEST v. DUGGER

Lloyd DUEST, Petitioner

v.

Richard L. DUGGER, etc., Respondent

Lloyd DUEST, Appellant

v.

STATE of Florida, Appellee.

Nos. 75039, 75254.

Supreme Court of Florida

Jan. 18, 1990

Petition was filed for writ of habeas corpus and appeal was taken from an order of the Circuit Court, Broward County, Patricia Cocalis, J., denying post-conviction relief. The Supreme Court held that: (1) defendant was not entitled to a new trial; (2) defendant was not

entitled to new sentencing proceeding; and (3) appellate counsel was not ineffective.

Order denying post-conviction relief affirmed, and petition for habeas corpus denied.

Shaw, J., concurred in the result only.

Barkett, J., concurred in the result.

Larry Helm Spalding, Capitol Collateral Representative, and Martin J. McClain, Deputy Chief Asst. CCR, and Judith J. Dougherty, Asst. CCR., Tallahassee, for petitioner/Appellant.

Robert Butterworth, Atty. Gen., and Celia A. Terenzio and Sylvia H. Alonso, Asst. Attys. Gen., West Palm Beach, for respondent/appellee.

PER CURIAM

This is a petition for writ of habea. corpus and an appeal from the denial of a motion for postconviction relief following an evidentiary hearing. Because the death sentence was imposed in this cas, we have jurisdiction under article V, section 3(b)(1) and (9), of the Florida Constitution. In order to give adequate consideration to the issues involved, this Court temporarily stayed Duest's impending execution. We now conclude that Duest is entitled to no relief.

Duest was convicted of first-degree murder. Pursuant to the

jury's recommendation, the trial judge imposed the death penalty. This Court affirmed both the conviction and sentence. Duest v. State, 462 So.2d 446 (Fla. 1985). We described the circumstances of the crime as follows:

> On February 15, 1982, defendant was seen by itnesses carrying a knife in the waistband of his pants. Sub-sequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy Sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Id. at 448.

Motion for Postconviction Relief

[1] Duest raises numerous claims, only two of which merit discussion. Duest first contends that he is entitled to a new trial because the state failed to disclose exculpatory evidence in violation of rule 3.220 of the Florida Rules of Criminal Procedure. In order to understand Duest's argument, it must be pointed out that Duest's defense at the trial was that of alibi. A number of relatives and friends testified that they had seen him in Wateredtown, Massachusetts, on February 15, 1982, the date on which the murder was committed. At the

evidentiary hearing on the motion for postconviction relief, it was developed that among Duest's personal effects contained in the police files was a bus ticket dated April 5, 1982, reflecting travel from Boston to Fort Lauderdale. The existence of this ticket was unknown to the prosecutor and had not been disclosed to the defense as part of discovery. Duest contended that had he known of the existence of this ticket, he could have introduced it into evidence at the trial in order to corroborate the testimony of his mother and father that they put him on the bus in Boston en route to Florida on April 5, 1982.

While it appears that the state inadvertently failed to furnish the ticket to the defense, we cannot see how this would have affected the outcome of the case. At trial, seven witnesses identified Duest as being in Fort Lauderdale, on February 15, 1982, when the murder occurred. In reaching its verdict, the jury chose to believe the state's witnesses rather than the witnesses introduced by the defense concerning Duest's whereabouts on the date of the murder. Whether or not Duest traveled from Boston to Fort Lauderdale forty-nine days later was irrelevant, and the introduction of the bus ticket would have

done little to enhance the credibility of Duest's parents.

[2] Further, we reject Duest's argument predicated upon Roman v. State, 528 So.2d 1169 (Fla.1988), that the effect of the nondisclosure of the bus ticket must be measured by the standard of harmless error in postconviction relief proceedings. In Roman, this Court vacated the defendant's conviction because the state had not disclosed two pretrial statements of a state witness which were inconsistent with his testimony at the trial. This witness was essential to negating the defendant's contention that he was insane by

reason of intoxication when the crime was committed. In referring to the harmless error rule in the course of rejecting the state's argument that this nondisclosure was harmless, we did not intend to create a new standard of review when discovery violations are proven in motions for postconviction relief. The test for measuring the effect of the failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v.

Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

[3] Duest further argues that he is entitled to have a new sentencing proceedings because subsequent to the imposition of the death penalty his Massachusetts conviction for armed assault with intent to murder has been vacated. He argues that because the aggravating circumstance of prior conviction of a felony involving the use or threat of violence to the person rested in part upon this conviction his death sentence should be vacated upon the authority of Johnson v. Mississippi, 486 U.S. 578, 108

S.Ct. 1981, 100 L.Ed.2d 575 (1988), and Burr v. State, 550 So.2d 444 (Fla. 1989). However, we conclude that Johnson and Burr do not mandate vacation of Duest's death sentence. We believe beyond a reasonable doubt that Duest would still have receive a sentence of death without evidence of this conviction.

In Johnson, the Supreme Court vacated a death sentence predicated in part on the aggravating circumstance of prior conviction of a violent felony when the conviction upon which that aggravating circumstance was based was later set aside. However, in the

instant case evidence was introduced that Duest had also been convicted of armed robbery. This conviction remains undisturbed. Therefore, there is still a basis for the aggravating circumstance of prior conviction of a violent felony. Bundy v. State, 538 So.2d 445 (Fla. 1989); Daugherty v. State, 533 So.2d 287 (Fla. 1988). In Burr the evidence of a collateral crime later held to be inadmissible provided much of the basis for two of the three aggravating circumstances.

Finally, it should be noted that there were three other valid aggravating circumstances applicable to Duest's sentence.

As we stated in our opinion on direct appeal, "even if we were to find that one or two of the aggravating circumstances found by the trial judge, was inapplicable, it would still be appropriate to maintain the death penalty." Duest v. State, 462 So.2d at 450 (citations omitted).

We reject as without merit the following additional claims:

(1) The trial judge was in error for refusing to disqualify herself from presiding over the rule 3.850 proceeding.

(2) The judge and the jury improperly relied upon victim impact evidence.

(3) Duest was denied effective assistance of counsel by trial counsel's conflict of interest in giving advice to alibi witnesses.

(4) Trial counsel was ineffective for failing to seek to suppress statements made by Duest to law enforcement officers.

(5) The State withheld other material exculpatory evidence and introduced false and misleading evidence.

(6) Defense counsel unreasonably misinformed the jury regarding the burden of proof with respect to alibi.

(7) Duest was denied effective assistance of counsel at the sentencing phase of his trial.

[4] Duest's contention that he was denied a fair trial when the state introduced evidence of flight is procedurally barred because of the failure to raise this issue on direct appeal. The same is true with respect to the claim that the state improperly introduced evidence of other crimes and bad character.

Duest also seeks to raise eleven other claims by simply referring to arguments presented

in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.

Petition for Writ of Habeas Corpus

Duest raises several points which he claims involve ineffective assistance of appellate counsel. We find that a number of these were not properly preserved for appeal by trial counsel. Therefore, appellate counsel cannot be

deemed ineffective for failing to raise the following issues:

(1) The jury was improperly instructed on the specially heinous, atrocious, and cruel aggravating circumstance.

(2) Evidence of other crimes and bad character was improperly introduced by the state.

(3) The penalty phase jury instruction shifted the burden of Duest to prove that death was an inappropriate penalty.

(4) During the guilt phase the prosecutor improperly asserted that sympathy and mercy toward Duest were improper

considerations, thus affecting the jury's considerations during the penalty phase.

(5) The jury's understanding of the importance of its role was impermissibly diminished.

(6) Nonstatutory aggravating factors were introduced into the sentencing phase.

(7) Evidence of Duest's post-**Miranda** silence was improperly introduced to show lack of remorse.

(8) Duest's death sentence was based on impermissible hearsay evidence contained in the presentence investigation report.

(9) The jury was erroneously instructed that a verdict of life must be made by a majority of the jury.

[5] We also reject Duest's claim that appellate counsel was ineffective for failing to argue the prejudicial effect of a photograph of the victim's dresser upon which there was a picture of persons who may have been the victim's family. Trial counsel did object to the introduction of this photograph, and Duest complains that this was error under Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The photograph of the

dresser appears to have been relevant to the case, and the fact that a picture of persons who may have been the victim's family appeared in the photograph injected minimal victim impact evidence into the trial.

[6] Further, Duest argues that appellate counsel was ineffective for failing to contend that the trial court erred in permitting, over objection, evidence that Duest tried to escape while he was in custody of the police. Duest was contacted by the Fort Lauderdale police on April 18, 1982, and advised that he was a suspect in the homicide. He

voluntarily went to the police station for questioning. At this time, Duest was known to the police as Robert Brigida. Duest was questioned by a detective about the murder. It was then discovered that misdemeanor traffic warrants were pending in Massachusetts against Robert Brigida, and Duest was arrested on these warrants. Thereafter, when the detective momentarily left the room and returned, Duest was missing. He was found several hours later at a Fort Lauderdale apartment.

Duest appellate counsel cannot be deemed ineffective for failing to argue this point.

Evidence in this case raised a reasonable inference that Duest escaped as a result of consciousness of guilt of the murder rather than the pending Massachusetts charges. Consistent with the rationale of Bundy v. State, 471 So.2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), the jury could properly infer such circumstantial evidence to be evidence of guilt. The argument would have been unavailing had it been raised on direct appeal.

Duest's claim that appellate counsel was ineffective for failing to argue that testimony relating the incident concerning

Duest's use of a razor should have been excluded is also without merit. In the context in which the evidence was presented, it may have been admissible. However, it is unnecessary for us to decide this question because even if it could be said that the evidence should have been excluded, the error would have been clearly harmless. Appellate counsel cannot be faulted for failing to argue a point which, even if correct, would amount to no more than harmless error.

Duest makes several other claims which are procedurally barred because they were not raised on direct appeal. These include the following:

(1) The trial court failed to find mitigating circumstances clearly contained in the record.

(2) Duest's death sentence rests upon an unconstitutional automatic aggravating circumstance.

(3) The aggravating circumstance of cold, calculated, and premeditated was unconstitutionally applied.

Finally, we note that Duest's claim for relief under Johnson v. Mississippi has been disposed of earlier in this opinion.

Conclusion

We affirm the order denying postconviction relief. We deny the petition for habeas corpus. We also vacate the stay of execution. No petition for rehearing shall be permitted.

It is so ordered.

EHRLICH, C.J., and OVERTON, MCDONALD, GRIMES and KOGAN, JJ., concur.

SHAW, J., concurs in result only.

BARKETT, J. concurs in result.

LLOYD DUEST, etc. Appellant,

v.

STATE OF FLORIDA, Appellee.

NO. 63,678

Supreme Court of Florida

January 10, 1985

Defendant was convicted in the Circuit Court, Broward County, Patricia W. Cocalis, J., of first-degree murder, for which the sentence of death was imposed, and defendant appealed. The Supreme Court, Adkins, J., held that: (1) trial court did not abuse its discretion in admitting testimony of rebuttal witnesses, even though State had not disclosed them prior to trial; (2) evidence was sufficient to support conviction; and (3) evidence was sufficient to support findings on challenged aggravating circumstances.

Affirmed.

R.E. Conner, Plantation, for appellant.

Jim Smith, Atty. Gen., and Marlyn J. Altman, Asst. Atty. Gen., West Palm Beach, for appellee.

ADKINS, Justice.

This cause is before the Court on direct appeal from a circuit court judgment adjudicating Lloyd Duest guilty of first-degree murder for which the sentence of death was imposed. This Court has jurisdiction. Art.V., §3(b)(1), Fla. Const. We affirm the conviction and sentence.

On February 15, 1982, defendant was seen by witnesses carrying a knife in the waistband of his pants. Subsequently, he told a witness that he was going to a gay bar to "roll a fag." Defendant was later seen at a predominantly gay bar with John Pope, the victim. The two of them then left

the bar in Pope's gold Camaro. Several hours later, Pope's roommate returned home and found the house unlocked, the lights on, the stereo on loud, and blood on the bed. The sheriff was contacted. Upon arrival, the deputy sheriff found Pope on the bathroom floor in a pool of blood with multiple stab wounds. Defendant was found and arrested on April 18, 1982.

Defendant was tried and found guilty of first-degree murder. In accordance with the jury's advisory recommendation, the trial judge imposed the death sentence.

Defendant first argues that the trial court erred in allowing two state witnesses to testify over defense counsel's objections. Defendant claims that the state did not provide defense counsel with the names and other material information concerning two of

its rebuttal witnesses until during the trial; therefore, counsel was unable to properly prepare for trial and defendant was prejudiced as a result of the non-disclosure.

[1,2] The established rule in this state is that if the state fails to disclose the identify of a witness, as mandated by Rule 3.220(a)(1)(i), Florida Rules of Criminal Procedure, then the witness cannot testify unless the court first conducts a hearing to determine whether the omission was willful or inadvertent, whether the omission was trivial or substantial, and whether the omission has prejudiced the defendant's ability to properly prepare his case. Richardson v. State, 246 So.2d 771, 775 (Fla. 1971). See also Haversham v. State, 427 So.2d 400 (Fla. 4th DCA 1983). In the instant case, there was

full disclosure as to why both state rebuttal witnesses were not thoroughly identified, including their whereabouts prior to trial. The significance of their testimony was explored as well as the impact on the defendant's ability to properly prepare for trial. Defense counsel had the opportunity to speak with both witnesses prior to their testimony and conceded at trial that there was no prejudice to the defendant other than the simple fact that the witnesses had not been fully disclosed prior to trial.

Based on the facts contained in the record, we find that the trial judge fully complied with the mandate of Richardson. There was no abuse of discretion in the decision of the trial judge to permit the two state rebuttal witnesses to testify.

Defendant next argues that his sixth amendment rights were abrogated when the prosecutor insulted defense counsel during cross-examination of a state witness. Defendant contends that such comments warranted the granting of his motion for mistrial.

[3-5] The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks. Ferguson v. State, 417 So.2d 639 (Fla. 1982). No request was made in this case. Moreover, a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230 (Fla. 1979). We believe that the comments of the prosecutor did not so prejudice the defendant. Thus, we find that the trial

judge did not abuse his discretion in denying defendant's motion for mistrial.

[6-8] Defendant further contends that there was insufficient evidence of premeditated murder to convict him as charged in the indictment. Premeditation, like other factual circumstances, may be established by circumstantial evidence. Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Such circumstantial evidence must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable hypothesis of innocence. Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). The record reflects that defendant had stated he gets his money by "rolling gay guys" and that he

intended to do the same on the day that the victim was murdered. Defendant was seen with the victim at a gay bar immediately prior to the murder and was seen leaving the bar with the victim in the victim's car. Shortly thereafter, defendant was seen driving the victim's car alone. At that time, witnesses saw blood stains on the sleeve of his jogging suit. The victim's stolen jewelry case was also seen in the car which was being driven by defendant after the murder. Moreover, on the day of the murder, defendant had in his possession a seven-inch knife. The cause of death in this case was multiple stab wounds. We find that there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder.

[9] Defendant also argues that the trial court erred in allowing the introduction of a prejudicial photograph which was irrelevant to any essential issue in the case. The law is well established that admission of photographic evidence is within the trial court's discretion and that a court's ruling will not be disturbed on appeal unless there is a showing of clear abuse. Wilson v. State, 436 So.2d 908 (Fla. 1983). No such showing has been made in this case. The photograph was relevant and any improper prejudicial impact did not outweigh its probative value. See Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 459 U.S. 882,103 S.Ct., 74 L.Ed.2d 148 (1982).

Finally, defendant objects to the trial court's findings with respect to

the aggravating and mitigating circumstances. The trial court found the following aggravating circumstances: 1) The defendant had been previously convicted of armed robbery and assault with intent to commit murder, section 921.141(5)(b);2) the capital felony was committed while the defendant was engaged in the commission of a robbery, section 921.141(5)(d); 3) the capital felony was committed for pecuniary gain, section 921.141(5)(f);4) the capital felony was especially heinous, atrocious, or cruel, section 921.141(5)(h); 5) the capital felony was a homicide which was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). The trial court considered circumstances 2 and 3 as one

circumstance because of overlapping facts and legal definitions. Therefore, four aggravating circumstances were applicable. As to mitigating circumstances, none were applied to this case.

[10] Defendant only challenges two of the aggravating circumstances. He asserts that the murder was not particularly heinous, atrocious or cruel. We disagree with the defendant. The evidence presented at trial shows that the victim received eleven stab wounds, some of which were inflicted in the bedroom and some inflicted in the bathroom. The medical examiner's testimony revealed that the victim lived some few minutes before dying.

This case is similar to Morgan v. State, 415 So.2d 6 (Fla. 1982), where the evidence showed that the death was

caused by one or more of ten stab wounds. In this case, this Court approved the finding that the homicide was especially heinous, atrocious, or cruel. Under the totality of the circumstances and applying our previous decisions to the facts of the instant case, we find that the trial court properly applied this aggravating circumstance.

[11] Defendant also challenges the finding that the homicide was committed in a cold, calculated, and premeditated manner. In finding that this aggravating circumstance applied, the trial court found:

> Evidence adduced at trial indicated that defendant informed witness Demezio some two days prior to the murder that be brings

> homosexuals back to their apartments, beats them up, and takes their money or jewelry. Defendant on the day of the murder went to his temporary residence with the victim, went into the closet where Domezio kept a dagger and left the residence with John Pope, Jr., the victim. The dagger was later discovered missing, and John Pope, Jr., was later discovered at his home, dead. His car and jewelry box were missing.

We find that the evidence supports the finding that the homicide was committed in a cold, calculated, and premeditated manner.

In the instant case, even if we were to find that one or two of the aggravating circumstances found by the trial judge, was inapplicable, it would still be appropriate to maintain the death penalty; Fleming v. State, 374 So.2d 954 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 493, 62 L.Ed.2d 414 (1979).

For the reasons expressed, we affirm the defendant's conviction and the imposition of the death sentence.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, J.J., concur.